Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOHN H. GARNER and wife, LANELLE H. GARNER,

Petitioners,

vs.

CORPUS CHRISTI NATIONAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Thirteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Does the ERISA pre-emption provision, 29 U.S.C. § 1144(a), pre-empt state law of contract or tort in the context of an informally-established or informally-maintained unfunded employee benefit plan? Phrased another way, does ERISA pre-empt state common law contract or tort claims when the existence of an "informal plan" under federal law is an essential part of the plaintiff's claim?

2.

Can state courts avoid their duty to enforce federal ERISA substantive law and ERISA enforcement rights under 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(e)(1) by applying state contract law as the substantive law in a case that relates to an informal ERISA plan?

PARTIES TO THE PROCEEDING

The parties to this proceeding are John H. Garner and wife, Lanelle H. Garner, plaintiffs and appellants below and Petitioners in this Court, and NationsBank of Texas, National Association, the successor in interest by merger of Corpus Christi National Bank, the defendant and appellee below, and Respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Thirteenth Judicial District of Texas, entered in this action on April 10, 1997, and the opinion overruling Petitioners' motion for rehearing, on May 22, 1997.

OPINIONS BELOW

The trial court judgment is not reported. (App. B-3)

The decisions of the Thirteenth Court of Appeals are reported as *Garner v. Corpus Christi National Bank*, 944 S.W.2d 469 (Tex. App. – Corpus Christi 1997, writ denied). (Apps. A-1, A-2)

The Texas Supreme Court denied the Petitioners' application for writ of error and their motion for rehearing without opinion. (Apps. D-2, D-4)

BASIS FOR JURISDICTION

Jurisdiction rests upon 28 U.S.C. § 1257(a), in that the highest court of the State of Texas in which a decision could be had has rendered judgment, and the Petitioners claim rights under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Sta. 829, as amended, 29 U.S.C. § 1001 *et seq.*

The opinion of the Court of Appeals for the Thirteenth Judicial District of Texas was entered on April 10,

1997. (App. A-1) The court of appeals overruled the parties' motions for rehearing by opinion dated May 22, 1997. (App. A-2) Application for writ of error was timely filed in the Texas Supreme Court, and was denied on May 8, 1998. (App. D-2) Petitioners' timely-filed motion for rehearing was denied on July 3, 1998. (App. D-4)

At each stage of the proceedings, Petitioners brought forward their ERISA matters. (Apps. B-1, B-2, B-4, C-1, C-2, C-3, D-1, D-3)

The judgment of the Court of Appeals for the Thirteenth Judicial District of Texas is thus before this Court on petition for writ of certiorari.

FEDERAL STATUTES INVOLVED

29 U.S.C. § 1002(2)(A) (Definitions):

> [T]he terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which . . . is hereafter established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .

29 U.S.C. § 1003(a)(1) (Coverage):

> [T]his subchapter shall apply to any employee benefit plan if it is established or maintained –

(1) by an employer engaged in commerce or in any industry or activity affecting commerce . . . .

29 U.S.C. § 1132(a)(1)(B) (Civil enforcement, persons empowered to bring action):

A civil action may be brought –

(1) by a participant or beneficiary –

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1132(e)(1) (Civil enforcement, jurisdiction):

State courts of competent jurisdiction . . . shall have concurrent jurisdiction of actions under paragraphs (1)(B) . . . of this section.

29 U.S.C. § 1144(a) (Other laws, supersedure):

[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(c) (Definitions):

For the purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.

STATEMENT OF THE CASE

Statement of Facts

Corpus Christi National Bank ("CCNB") hired John Garner ("Garner") to be its President and Chief Executive Officer in 1974. Tr. 43-44; 298. Six years later, CCNB through its Executive or Policy Committee, entered into a written commitment with Garner.[1] (App. E-1) The agreement was entitled "Commitment made to John Garner as of August 4, 1980" ("1980 Commitment"). Tr. 133. At the time, CCNB was a wholly-owned subsidiary of a bank-holding company named Mercantile Texas.

Harvey Weil, an attorney and member of CCNB's Executive Committee, wrote the 1980 Commitment long-hand, and each member of the committee signed it. Tr. 133; 266-67; 325-26; 446. Further, the 1980 Commitment was approved by the Chairman of the Board of Mercantile Texas, Gene Bishop. Tr. 134; 325-26.

The 1980 Commitment contained certain representations relating to salary and employment terms. The 1980 Commitment also touched on employee benefit plans. In this regard, it provided that Garner "is to be entitled to incentive bonus, ESOP plan, ICESOP plan, Career Executive Stock Plan, and Management Security Plan (if adopted) and other benefits of executive employees – all based on his base salary or otherwise as applicable." Tr. 133. (App. E-1, at App. 96)

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[1] The intent of the 1980 Commitment was to keep Garner with the bank as President and CEO after he had been offered a lucrative employment opportunity with Valero Energy Corporation. Its terms were designed to match or exceed Valero's offer of employment. Tr. 298-300; 324-26; 447.

The "Management Security Plan" referred to in the 1980 Commitment ("Plan") was an unfunded employee benefit plan designed to supplement the retirement income for select executives of Mercantile Texas and its wholly-owned subsidiary banks. It was subsequently replaced by a similar unfunded plan, denominated as the "Executive Security Plan" ("Plan"), when Mercantile Texas and Southwest Bancshares merged and the surviving entity became known as MCorp. Tr. 189. A formal plan document was executed by MCorp and Garner. Tr. 196. CCNB was the "sponsor[ ]" of the Plan. Tr. 189. MCorp was CCNB's bank-holding company and its agent with respect to CCNB's employee benefit plans. Tr. 447.

After Garner retired in 1986, he remained employed with CCNB as a consultant until 1990. Garner received retirement benefits under the Plan until May 1988, when MCorp filed for bankruptcy under Chapter 11. Tr. 447. CCNB then refused responsibility for the payment of the benefits under the Plan or under any Informal Plan, and Garner did not receive his promised benefits in full.

Was there an "Informal Plan" between CCNB and Garner? From the context of the 1980 Commitment and surrounding circumstances, CCNB, Garner's employer, clearly intended to provide employee benefits under employee benefit plans to Garner. Tr. 133; 325; 447. Garner relied on the representations that he would receive the enumerated benefits upon his retirement and decided to stay with CCNB instead of taking new employment. Tr. 133; 325; 415; 447.

During the course of Garner's employment with CCNB and following his retirement as an employee,

CCNB played a substantial role in the establishment and administration of the Plan. CCNB was the "sponsor[ ]" of the Plan. Tr. 189. Significantly, CCNB had responsibilities in funding the Plan; it was expected to make contributions to the parent company, MCorp, relating to the Plan. Tr. 186, 187. CCNB also had the administrative responsibility of handling the payments under the Plan, which were to be by monthly checks. Tr. 317-19; 313. CCNB was to "instruct their [sic] Finance Department to commence paying retirement benefits" to Garner pursuant to accounting procedures to be followed by CCNB's Comptroller. Tr. 186.

Similar to the other benefit plans mentioned in the 1980 Commitment, CCNB possessed a copy of the terms of the Plan in its personnel files. Tr. 268, 317. Moreover, it listed the Plan among its various employee benefit obligations to Garner. Tr. 247; 272-73; 314-15; 317. The benefits outlined in the Plan were based upon Garner's salary and tenure at CCNB, not at the bank-holding company. Moreover, the promised benefits were conditioned on Garner's continuing employment with CCNB. Tr. 160. Administratively, the Plan was handled similarly to the other benefit plans provided the CCNB employees. Tr. 239; 242-244; 316. At the time the 1980 Commitment was made, Garner knew that he was the intended beneficiary of a plan. Tr. 446-47. He was informed that the intended benefits arising out of the plan would be pre-retirement death benefits and post-retirement income benefits. Tr. 446-47. Garner knew the source of financing of the plan, as he knew that the plan was to be unfunded. Tr. 446-47. Garner also knew the procedures for receiving benefits under the plan were to be either through a lump-sum

payment to his estate (in the event of death) or periodic payments to him upon his retirement. Tr. 446-47.

Proceedings in State Courts Below and Preservation of Federal Questions

The Garners sued Corpus Christi National Bank in the 214th Judicial District Court of Nueces County, Texas, eventually alleging both ERISA and state-law claims. The Garners pled as follows:

> [A]s a consequence of the [Bank's] representations, the [Garners] are entitled to the benefits described in the Executive Security Plan, and, in addition, are entitled to reasonable attorney's fees, under applicable federal law. See Chapter 18 of Title 29 of the United States Code.

Tr. 436. (App. B-1, at App. 25)

CCNB filed a motion for summary judgment on Garners' whole case. Tr. 9-123. In their responsive pleading and in their cross motion for summary judgment, the Garners raised their ERISA claim and submitted evidence in support of it. Tr. 124-433; 443-513; 514-627. (App. B-2) On March 3, 1995, the trial court rendered summary judgment disposing of the Garners' claims, including their claims based upon ERISA. Tr. 674-75. (App. B-3) The trial court denied the Garners' Motion for Reconsideration. Tr. 705. (Apps. B-4, B-5)

The Court of Appeals for the Thirteenth Judicial District of Texas, Corpus Christi, Texas, affirmed the trial court's summary judgment on the Garners' ERISA claims by opinion dated April 10, 1997. (App. A-1)

In its opinion, the court of appeals recognized that the gist of the Garners' claim was "to recover benefits

allegedly due." (App. A-1, at App. 3) The ERISA issues were raised on appeal in the Garners' fifth point of error and received extensive treatment in their Appellants' Brief. (App. C-1)

In its opinion, the court of appeals addressed the Garners' numerous state law claims, and generally affirmed the summary judgment. Citing TEX. R. APP. P. 90(a)[2], the court of appeals summarily disposed of the Garners' fifth point of error that raised the informal ERISA plan issue: "Due to our disposition of the above points [relating to claims based upon state common law and statutes], we need not address the remaining points of error." (App. A-1, at App. 19) There was no other discussion. Implicitly, the court of appeals was holding that federal law was not "necessary" to the disposition of the case.[3]

The Garners filed a motion for rehearing, the first three points taking issue with the court of appeals' disposition of their "informal plan" claims. (App. C-2) The Garners' motion for rehearing was overruled on May 22, 1997. (App. A-2) In its opinion denying the motion for rehearing, the court of appeals stated that summary judgment was proper on the Garners' ERISA claims because

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[2] The former TEX. R. APP. P. 90(a) provided that the court of appeals was to "address every issue raised and necessary to final disposition of the appeal." Since the federal claims were raised but not addressed, it follows that the court of appeals must have been of the opinion that review of federal law was not "necessary." The duty has been continued in the new rules of appellate procedure. *See* TEX. R. APP. P. 47.1.

[3] *See supra* note 2.

the "ERISA claim encompasses the state-law claim for benefits due." (App. A-2, at App. 22) The court of appeals reasoned that the employer had to breach its duty to provide benefits under state contract law before liability arose under ERISA. According to the court of appeals "[t]he ERISA claim . . . is dependent upon" the state law claims. Since there was no liability under state law contractual principles, according to the court, there was no liability under ERISA. (App. B-2, at App. 22)

Applications for writ of error that raised the issues of pre-emption and the "informal plan" doctrine were timely filed with the Texas Supreme Court and were denied without opinion. (Apps. D-1; D-2) The Garners' motion for rehearing on the denial of their application for writ of error was denied on July 3, 1998, again without opinion. (Apps. D-3; D-4)

REASONS FOR GRANTING THE WRIT

This Court should review the issues raised in this petition for writ of certiorari because the judgment of the Thirteenth Court of Appeals conflicts with the express language of ERISA, with the legislative policy underlying ERISA, and with judicial construction of ERISA's definitional and coverage sections. The court of appeals never recognized the *Donovan* "informal plan" doctrine. Every federal circuit recognizes the "informal plan" doctrine enunciated in *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982) (en banc). Instead of applying federal substantive law on the basis of federal pre-emption, the Texas

court of appeals disposed of the Petitioners' federal claims using state contract law.

The failure of the Texas court of appeals to recognize pre-emption and apply federal law directly conflicts with the decisions of this Court relating to ERISA pre-emption of state law.

I. The Texas Thirteenth Court of Appeals has decided an important federal question relating to the existence of a "plan, fund, or program," under ERISA's definitional and coverage sections, 29 U.S.C. § 1002(2)(A) and 29 U.S.C. § 1003(a)(1), in the context of an informal plan in a way that conflicts with a federal statute, the legislative policy of Congress, the decisions of this Court, the United States courts of appeals, and the decisions of other State courts of last resort.

The Federal Decisional Law: The *Donovan* "Informal Plan" Doctrine

The watershed issue in an ERISA case is the existence of an employee benefit "plan, fund, or program" established or maintained by an employer. *See* 29 U.S.C. §§ 1002, (2)(A), (3), 1003(a); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986) ("existence of a plan is a prerequisite to jurisdiction under ERISA"). The existence of an "employee benefit plan" triggers ERISA's pre-emption provisions, which are meant to eliminate the threat of conflicting or inconsistent state regulation of employee benefit plans. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987). Although many, if not most, employee benefit plans involve formal plan documents, federal courts – and

every state court but the Court of Appeals of the Thirteenth District of Texas – have univocally recognized the existence of informal plans. An informal plan between CCNB and Garner is at issue in this case.

The seminal informal plan case is the Eleventh Court of Appeals' en banc decision of *Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982) (en banc). The court in *Donovan* held that "ERISA does not . . . require a formal, written plan." *Id.* at 1372. An employer can establish or maintain an informal plan "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Id.* at 1372-73. That holding is not only demanded by the provisions of ERISA, but as the eleventh circuit in *Donovan* noted, it would be "incongruous" for an employer to escape liability under ERISA by not complying with ERISA. *Id.* at 1372.

Univocally, the federal circuit courts of appeal have adopted the *Donovan* informal plan doctrine as federal law. *E.g., Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082-83 (1st Cir. 1990); *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151 (2nd Cir. 1994); *Deibler v. United Food and Commercial Workers' Local Union 23*, 973 F.2d 206, 209 (3rd Cir. 1992); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861-62 (4th Cir. 1994) (en banc); *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 415 (5th Cir. 1990); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989); *Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809, 811-12 (7th Cir. 1994); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir. 1985); *Peckham v. Gem State Mutual*

of Utah, 964 F.2d 1043, 1047-48, 1048 n. 6 (10th Cir. 1992); *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D. C. Cir. 1994).

Moreover, this Court has implicitly adopted the notion of an "informal plan." *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 328 (2nd Cir. 1985) (citing *Donovan* for the proposition that failure to comply with ERISA formalities does not mean no ERISA plan exists), *summarily aff'd sub nom. Brooks v. Burlington Ind., Inc.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986).

The state supreme courts that have reviewed this issue acknowledge the supremacy of federal law and have adopted the *Donovan* test. *E.g., Plymouth and Brockton Street Railway Co. v. Leyland*, 664 N.E.2d 17, 20 n. 3 (Mass. 1996); *Shaw v. PACC Health Plan, Inc.*, 908 P.2d 308, 314 n. 8 (Or. 1995); *Marshall v. Bankers Life and Casualty Co.*, 832 P.2d 573, 578 (Cal. 1992).

Thirteenth Court of Appeals Ignored or Rejected *Donovan* "Informal Plan" Doctrine

By refusing to recognize the "informal plan" doctrine under federal law, the opinion of the Court of Appeals for the Thirteenth Judicial District of Texas conflicts with ERISA's definitional and coverage sections, 29 U.S.C. §§ 1002(2)(A), 1003(a)(1), as construed by every federal circuit and this Court.

II. The Texas Thirteenth Court of Appeals has decided an important federal question relating to federal pre-emption of state law under ERISA's pre-emption provisions, 29 U.S.C. § 1144(a), in the context of an informal plan in a way that conflicts with a federal statute, the legislative policy of Congress, and the decisions of this court in *Taylor* and *Pilot Life*.

Federal Pre-emption Applies to Informal Plans

The existence of a "plan, fund, or program," including an "informal plan," triggers ERISA's pre-emption provisions. It is well-established that ERISA's "clearly expansive" pre-emption clause, 29 U.S.C. § 1144(a), means that the decisional, or substantive, law in a case that "relates to" an ERISA plan is exclusively federal. "If a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995).

A state law "relates to" an ERISA plan if it "has a connection with" an ERISA plan, or if it has a "reference to" an ERISA plan. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 837, 136 L.Ed.2d 791 (1997); *see also De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 1751 (1997); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2899-2900, 77 L.Ed.2d 490 (1983). Under this " 'broad common-sense meaning,' a state law may 'relate to' a benefit plan . . . even if the law is not specifically designed to affect

such plans, or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990) (quoting *Pilot Life*, 481 U.S. at 47, 107 S.Ct. at 1552-53).

This Court has found "no difficulty" holding that state law or a state law claim has a connection with or reference to an ERISA plan when the existence of an ERISA plan "is a critical factor in establishing liability under the State's" law. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40, 111 S.Ct. 478, 483, 112 L.Ed.2d 474. When "the court's inquiry must be directed to the plan, . . . [the] cause of action 'relate[s] to' an ERISA plan." *Ingersoll-Rand*, 498 U.S. at 140, 111 S.Ct. at 483.

Necessarily, state-based common law causes of action – whether *ex contractu* or *ex delicto* – that "relate to" an ERISA plan are pre-empted. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987); *Pilot Life*, 481 U.S. at 47-48, 107 S.Ct. at 1553. The pre-emption provision displaces all state laws within its ambit, even state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). Because the decisional law in a case that "relates to" an ERISA plan is necessarily federal, claims that "relate to" an employee benefit plan are "necessarily federal in character by virtue of the clearly manifested intent of Congress." *Taylor*, 481 U.S. at 67, 107 S.Ct. at 1548. Moreover, ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(1)(B), provides an "exclusive" federal cause of action for resolution of disputes that relate to an employee benefit plan. *Pilot Life*, 481 U.S. at 56, 107 S.Ct. at 1557. While the source of the cause of action is federal

law, state court and federal courts have concurrent jurisdiction to enforce ERISA claims brought under 29 U.S.C. § 1132(a)(1)(B). *See* 29 U.S.C. § 1132(e)(1).

The Erroneous Ruling of the Thirteenth Court of Appeals

The Court of Appeals for the Thirteenth Judicial District of Texas never substantively treated the Petitioners' ERISA claim using the applicable standards of federal law.[4] Ignoring federal standards, it applied exclusively state law in disposing of the Garners' claims. According to the court of appeals, this is because "[t]he ERISA claim encompasses the state-law claim for benefits due, and accordingly is dependent upon a finding that the Bank breached its [state-law contractual] duty to provide such benefits." (App. A-2, at App. 22)

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[4] Notably, the court of appeals' original opinion cites no federal case or federal statute, despite the fact that the Garners devoted 15 pages of the Appellants' Brief (about 30% of the brief) on that subject. Nowhere does it discuss ERISA, the factors required to establish a "plan," the evidence in the record that meets all the *Donovan* requirements, or federal pre-emption. In its opinion on motions for rehearing, the court of appeals cites 29 U.S.C. § 1132(a)(1)(B) & (e)(1) without discussion. It cites no federal case, it avoids mention of the pre-emption clause, and again fails to analyze the record in light of the *Donovan* informal plan elements. In sum, the court of appeals completely failed in, or purposely avoided, enforcing federal law and the Petitioners' federal rights.

Court of Appeals Applied State Decisional Law and Did Not Recognize ERISA Pre-Emption of State Decisional Law

In holding that the Garners' ERISA claim "encompass[ed]" their state law contract claims, the court of appeals got it backwards. It also got it backwards in suggesting that the "ERISA claim . . . is dependent upon a finding that the Bank breached its state law [contractual] duty to provide such benefits." *Id.* Its error stems from the notions that the Garners' state-law contractual claims and federal-law ERISA claims against the Bank somehow co-exist, or that the analysis relevant to a state-law contract claim is necessarily dispositive of the federal ERISA claim.[5] Behind those notions is a refusal to acknowledge ERISA's pre-emptive effect on any state decisional law and cause of action and the exclusive federal nature of the Garners' pled ERISA claim.

The Harm of Using State Contract Law Analysis v. Federal "Informal Plan" Analysis

There is no perfect congruence between federal law dealing with the existence of, and the rights under, an "informal plan" and state law relating to the formation, construction, and breach of contract. Because the federal definition of an "informal plan," "is a purely functional

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[5] The Southwestern Reporter editor caught the import of the court of appeals' reasoning when he or she interpreted the court's holding to be that "failure of employee's state law breach of contract claim entitled employer to summary judgment on employee's ERISA claims." *Garner*, 944 S.W.2d at 472 (Headnote 30).

definition, *the range of facts that may be considered in determining whether the employer established a plan is necessarily broader than those that would be used to determine whether a contract had been created at common law." Kenney v. Roland Parson Contracting Corp.*, 28 F.3d at 1254, 1257 (D.C. Cir. 1994) (emphasis added). Indeed, circumstances may exist where a "de facto" plan exists irrespective of the parties' intent, *see Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994), which is the touchstone of state contract law. The marked difference between the *Donovan* requirements (which are an expression of this "functional definition") and state contractual principles of formation and construction are self-evident.[6] The difference is not of degree, but of kind.

Moreover, an analysis of the formal plan between MCorp and Garner based on state law principles is not dispositive of the analysis required to determine whether an informal plan existed between Garner and Garner's employer and MCorp's then-subsidiary, Corpus Christi National Bank. The reason for this is that "[a]n informal plan may exist *independent of, and in addition to, a formal plan* as long as the informal plan meets all the elements outlined in *Donovan*. *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (emphasis added).

Likewise, an analysis of the 1980 Commitment as an employment contract under state-contractual principles does not dispose of the ERISA "informal plan" claim. The

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[6] The use of the "broader" "functional" federal standard *vis a vis* state-law contract principles is particularly critical in summary judgment contexts where the employee is, in addition, the non-movant.

same agreement can give rise to an employment contract and an informal ERISA plan. *See Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376-77 (9th Cir. 1994) ("Because ERISA's definition of a pension plan is so broad, virtually any contract that provides for some type of deferred compensation will also establish a de facto pension plan, whether or not the parties intended to do so").

The Opinion of The Court of Appeals For The Thirteenth Judicial District of Texas Contravenes Congressional Policy of Uniformity and Solicitude For Employees

Conventional conflict pre-emption principles demand pre-emption where "state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754, 1762 (1997) (quoting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 2383, 120 L.Ed.2d 73 (1992)). "In the face of [a] direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand. . . . States are not free to change ERISA's structure and balance." *Boggs*, 117 S.Ct. at 1762. The court of appeals did just that.

The court of appeals' application of state law conflicts with the legislative purpose behind ERISA's pre-emption clause, which is to enhance the efficient operation of that federal statute by encouraging uniformity in employment benefit laws and the elimination of state and local interference with employee benefit plans. *See Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1132 (1st Cir. 1995) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484-85, 112 L.Ed.2d 474 (1990)). "Any hope

of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA." *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1147 n. 5 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986).

And uniformity is lost by the court of appeals' judgment. Uniformly, federal courts have adopted the *Donovan* informal plan doctrine as a correct statement of federal law. Uniformly, state supreme courts have recognized the supremacy of federal decisional law, the preemption of state law, and have adopted the *Donovan* informal plan doctrine. Uniformly in Texas – except for the vanguard Court of Appeals for the Thirteenth Judicial District of Texas – appellate courts have recognized the pre-emptive nature of federal law and have adopted, discussed, and analyzed cases that "relate to" benefit plans using the *Donovan* informal plan doctrine. *Compare Garner v. Corpus Christi Nat'l Bank*, 944 S.W.2d 469 (Tex. App. – Corpus Christi 1997, writ denied) (applying state contract law and not recognizing *Donovan*) with *Grainger v. Western Casualty Life Insurance Co.*, 930 S.W.2d 609, 614 (Tex. App. – Houston [1st Dist.] 1996, writ denied); *Waddell v. Kaiser Foundation Health Plan of Texas*, 877 S.W.2d 341, 345 (Tex. App. – Dallas 1994, writ denied); *McLellan v. Klein*, 867 S.W.2d 953, 955 (Tex. App. – Beaumont 1994, writ denied); *Burghart v. Connecticut General Life Ins. Co.*, 806 S.W.2d 324, 326 (Tex. App. – Texarkana 1991, no writ) (all applying *Donovan*).

The stated Congressional policy "to protect . . . the interests of participants in employee benefit plans and

their beneficiaries," 29 U.S.C. § 1001(b), is stymied by the court of appeals' singular application of state contract law to a claim that relates to an informal benefit plan. Texas contract law does not embody the same Congressional solicitude for employees and plan participants which animates ERISA.

> When Congress, in the exertion of the power confided to it by the Constitution, adopted [ERISA], it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [Texas] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Mondou v. New York, N. H. & H. R. Co., 223 U.S. 11, 57, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912) (case involved Emergency Price Control Act and State of Connecticut).

Summary

The Petitioners are entitled to the protection of ERISA. They are entitled to have the state court recognize – and enforce – federal law. This Court should not sit tranquil while a State intermediate court neglects – or refuses to recognize – its responsibility to enforce the laws of Congress requisite under the Supremacy Clause of the U.S. Constitution, U.S. CONST. art. VI, cl. 2:

> A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse." . . . An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy

> Clause forbids state courts to dissociate themselves from federal law because of . . . a refusal to recognize the superior authority of its source. . . .

Howlett v. Rose, 496 U.S. 356, 369-72, 110 S.Ct. 2430, 2439-40, 110 L.Ed.2d 332 (1990) (citations omitted).

The court of appeals' reliance on state law is not a "valid excuse." Indeed, it is palpably violative of federal law. It ignores ERISA's pre-emption provisions and is inconsistent with the uniformity policy of ERISA underlying them. The issue of the Thirteenth Court of Appeals' neglect of ERISA law is a matter of great importance which justifies a writ of certiorari. "Whether state courts may decline to enforce federal laws . . . is a question of great importance." *Testa v. Katt*, 330 U.S. 386, 388, 67 S.Ct. 810, 812, 91 L.Ed. 967 (1947).

The judgment of the court of appeals also contradicts the rulings of this Court that hold in no uncertain terms that State contract law is pre-empted by ERISA when a claim "relates to" a plan, as the claim in this case most certainly does. *See Taylor*, 481 U.S. 58, 62, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55; *Pilot Life*, 481 U.S. at 47-48, 107 S.Ct. at 1553. This Court has granted certiorari when a state court's judgment is inconsistent with its precedents. *Duren v. Missouri*, 439 U.S. 357, 363, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

CONCLUSION & PRAYER

For the foregoing reasons, the petition for a writ of certiorari should be granted and this cause set for briefing and oral argument. Alternatively, this Court should grant certiorari, vacate the judgment of the Court of Appeals for the Thirteenth Judicial District of Texas, and remand with instructions to apply federal ERISA law relating to "informal plans" and federal pre-emption.[7]

Respectfully submitted,

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[7] GVR is appropriate when the decisions of state courts of last resort "are ambiguous as to whether they rest on state-law or federal-law grounds." *Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 611, 614 (1996) (Scalia, J., dissenting). The court of appeals' opinion is, at best, ambiguous. Formally, it cites federal statute as its decisional basis. Materially, it relies wholly on state contract law and ignores federal precedent. Thus, this Court may consider GVR appropriate relief under these circumstances to give the court of appeals the opportunity expressly to apply the federal "informal plan" doctrine.

APPENDIX A-1

Judgment & Opinion Of The Court Of Appeals For The Thirteenth Judicial District Of Texas

COURT OF APPEALS
Thirteenth Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the *10th day of April, 1997.* If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-95-105-CV (Tr. Ct. No. 92-1938-F)

JOHN H. GARNER AND WIFE,
LANELLE H. GARNER,

Appellants,

v.

CORPUS CHRISTI NATIONAL BANK,

Appellee,

on appeal to this Court from Nueces County, Texas.

* * *

JUDGMENT

On appeal from the 214th District court of Nueces County, Texas, from a judgment signed March 3, 1995. Opinion by Chief Justice Robert J. Seerden. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on February 8, 1996, on oral argument, the record, and briefs. These having been examined and fully considered, it is the

opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Costs of the appeal are adjudged one-fourth against appellants, John H. Garner and wife, Lanelle H. Garner, and three-fourths against appellee, Corpus Christi National Bank. It is further ordered that this decision be certified below for observance.

* * *

CATHY WILBORN, CLERK

[LOGO]

NUMBER 13-95-105-CV
COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

JOHN GARNER AND WIFE,
LANELLE H. GARNER,

Appellants,

v.

CORPUS CHRISTI NATIONAL BANK,

Appellee.

On appeal from the 214th District Court
of Nueces County, Texas.

OPINION

Before Chief Justice Seerden and Justices Yañez and Chavez
Opinion by Chief Justice Seerden

This is a suit to recover benefits allegedly due under an employment contract. John and Lanelle Garner sued Corpus Christi National Bank (CCNB) to collect benefits allegedly due under an employment contract between John Garner and CCNB. Both parties moved for summary judgment. The trial court granted CCNB's motion and denied the Garners' motion for summary judgment. The Garners appeal by fifteen points of error. We affirm in part and reverse and remand in part.

In 1974, CCNB hired John Garner as its president and chief executive officer. At some point, Valero Corporation offered him a job, which he considered. Due to that offer, CCNB's executive committee entered into an employment contract with Garner. The contract stated that it was a commitment made to John Garner as of August 4, 1980 (the 1980 Commitment). It stated that Garner was to continue in CCNB's employ, subject to health and ability to perform. It also stated that he was to be entitled to incentive bonuses, ESOP plan, ICESOP plan, Career Executive Stock Plan, a Management Security Plan (if adopted), and other benefits of executive employees – all based on his base salary or otherwise as applicable.

Mercantile Texas Corporation owned CCNB when the latter made the 1980 Commitment. Mercantile Texas established a management security plan (MSP), and on March 29, 1983, Garner and Mercantile Texas signed an agreement showing Garner's participation in the MSP.

Thereafter, Mercantile Texas and Southwest Bancshares merged, and the surviving entity became known as MCorp. CCNB became known as MBank Corpus Christi, an MCorp subsidiary. MCorp replaced the Mercantile Texas MSP with an MCorp Executive Security Plan (ESP). On December 28, 1984, Garner and MCorp signed an agreement showing Garner's participation in the MCorp ESP.

Garner's salary and other benefits were paid to him in accordance with the 1980 Commitment through December 1, 1986, his retirement date. On that date, Garner began receiving payments of $9,068.13 per month from MCorp under his 1984 ESP agreement with MCorp. These payments continued through April or May of 1989. On March 20, 1989, MCorp filed for bankruptcy, and all MCorp ESP payments ceased.

John Garner and his wife, Lanelle, sued CCNB, alleging that CCNB breached its obligations under the 1980 Commitment because it refused to pay them the ESP benefits. Garner sought to recover the money due to him under the 1980 Commitment.

CCNB moved for summary judgment on the grounds that it did not breach the 1980 Commitment, that John Garner was not a consumer under the DTPA, and that it was not liable under the Personnel Employment Services Act. The Garners also moved for summary judgment on their suit. The court granted summary judgment for CCNB on all grounds, and it denied the Garners' summary judgment motion. This appeal followed.

To prevail on a summary judgment motion, a movant must establish that there is no genuine issue concerning

any material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). A defendant who conclusively negates at least one of the essential elements of the plaintiff's causes of action or who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). In reviewing a summary judgment, we must accept as true evidence in the nonmovant's favor, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

By point fifteen, the Garners assert that the court erred in granting summary judgment for CCNB because Jerry Gates' affidavit was testimony of an interested witness without personal knowledge, and it was not free from contradictions and otherwise clear, positive, and direct.

CCNB's summary judgment motion included Jerry Gates' affidavit. Gates was a former president, CEO, and director of CCNB. The Garners argue that the summary judgment proof showed that CCNB considered the ESP its employee benefit plan, but that Gates' affidavit controverted that position. Therefore, Gates' affidavit was not sufficiently clear, positive and direct, otherwise credible and free from contradictions and inconsistencies in order to support a judgment for CCNB.

Rule 166a(f), Texas Rules of Civil Procedure, states that "Supporting and opposing affidavits shall be made

on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Gates stated in his affidavit that he had personal knowledge of the facts because: 1) as former president, CEO, and director of CCNB, he had reviewed the 1980 Commitment; 2) he attended and participated in subsequent CCNB Board of Directors and Executive Committee meetings at which the 1980 Commitment and Garner's benefits thereunder were discussed; and 3) he reviewed Garner's personnel, payroll, and retirement files. Therefore, he was familiar with the provisions and administration of the 1980 Commitment and the facts set forth therein.

Gates' affidavit met the requirements of Rule 166a(f) because it showed how he became familiar with the facts in the affidavit. Further, the affidavit is clear, positive and direct, otherwise credible, and free from contradictions and inconsistencies. We overrule point fifteen.

By points one and two, the Garners assert that the court erred in granting summary judgment on their contract claim. They assert that the unambiguous language of the 1980 Commitment establishes that Garner is entitled to the promised benefits. Alternatively, the language is ambiguous, precluding summary judgment on their claim. In any event, the 1980 Commitment did not unambiguously provide that CCNB was not liable to Garner for the employee benefits it promised.

The operative language of the 1980 Commitment stated as follows: "J.G. [John Garner] is to be entitled to

incentive bonus, ESOP plan, ICESOP plan, Career Executive Stock plan, and Management Security Plan (if adopted) and other benefits of executive employees – all based on his base salary or otherwise as applicable."

The Garners' contention is that CCNB is liable to Garner for benefits because the 1980 Commitment stated that he was entitled to a Management Security Plan (if adopted) and other benefits of executive employees.

CCNB's summary judgment motion attacked the contract claim on three grounds. First, it argued that the 1980 Commitment was an unambiguous document which did not entitle Garner to the MSP benefits unless adopted by CCNB.

In construing a written contract, the primary concern of the court is to ascertain the parties' true intentions as expressed therein. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 529 (Tex. 1987); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *Cambridge Oil Co. v. Huggins*, 765 S.W.2d 540, 543 (Tex. App. – Corpus Christi 1989, writ denied). All provisions in a contract are considered with reference to the whole instrument. *Coker*, 650 S.W.2d at 393; *First Victoria Nat'l. Bank v. Briones*, 788 S.W.2d 632, 634 (Tex. App. – Corpus Christi 1990, writ denied). If the written instrument is worded so that it has a certain, definite meaning or interpretation, then it is not ambiguous, and the court will construe it as a matter of law. *Coker*, 650 S.W.2d at 393; *Huggins*, 765 S.W.2d at 543.

We give the language used by parties in a contract its plain, grammatical meaning unless it definitely appears that this would defeat the parties' intention. *Reilly*, 727 S.W.2d at 529; *Lyons v. Montgomery*, 701 S.W.2d 641, 643

(Tex. 1985). When construing the terms of an instrument, we will presume that they will have their plain, ordinary, and generally accepted meanings unless the instrument itself shows the terms were used in a technical or different sense. *Milton v. Aransas Shrimp Co-op*, 668 S.W.2d 735, 739 (Tex. App. – Corpus Christi 1983, writ dism'd).

According to the 1980 Commitment, the intention of the parties was that Garner would participate in the MSP (if adopted) and receive other benefits of executive employees. This language has a certain, definite meaning or interpretation, and, therefore, is not ambiguous. We will construe the contract as a matter of law. *See Coker*, 650 S.W.2d at 393; *Huggins*, 765 S.W.2d at 543.

Jerry Gates, CCNB's former president and CEO, stated in his affidavit that CCNB was not a party to Garner's 1983 agreement with Mercantile Texas to participate in Mercantile's MSP. CCNB was also not a party to Garner's 1984 agreement with MCorp to participate in MCorp's ESP. He further stated that on various occasions, CCNB did adopt other programs and plans of both MCorp and Mercantile Texas. However, CCNB's board of directors never adopted the MSP and ESP for Garner's benefit.

Since CCNB did not adopt the MSP or ESP, Garner was not entitled to receive these benefits as part of the 1980 Commitment.

CCNB's second attack on the contract claim was that it had no liability to pay the ESP benefits because the contract language did not guarantee payment of those benefits in the event the parent corporation defaulted.

A promise by one person to answer for the debt, default, or miscarriage of another person is not enforceable unless the promise or agreement, or a memorandum of it, is in writing and signed by the party upon whom liability is sought. TEX. BUS. & COMM. CODE ANN. § 26.01 (a), (b)(2) (Vernon 1987); *Smith, Beckman, Reid, Inc. v. Metro Nat'l. Corp.*, 836 S.W.2d 817, 820 (Tex. App. – Houston [1st Dist.] 1992, no writ). This statute requires that a written memorandum must exist which is complete within itself in every material detail, and which contains all of the essential elements of the agreement so that a person can ascertain the contract from the writings without resorting to oral testimony. *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978); *Block v. Aube*, 718 S.W.2d 914, 915 (Tex. App. – Beaumont 1986, no writ).

A guaranty creates a secondary obligation whereby the guarantor promises to answer for the debt of another, and a creditor may call upon the guarantor to perform once the primary obligor has failed to perform. *Republic Nat'l. Bank v. Northwest Nat'l. Bank*, 578 S.W.2d 109, 114 (Tex. 1978).

In the instant case, the 1980 Commitment is complete within itself in every material detail, and it included all the essential elements of the agreement. The contract did not create a secondary obligation whereby CCNB promised to answer for the debt of another, including MCorp. *See Cohen*, 565 S.W.2d at 232; *Block*, 718 S.W.2d at 915. The Garners did not have a written agreement showing that CCNB agreed to become liable for MCorp's debt arising from Garner's 1984 ESP agreement with MCorp. In his deposition, Garner answered "I don't recall" when asked if anyone from CCNB represented to him, either before or

after the 1980 Commitment, that in the event that the obligor under an MSP or ESP quit making payments, that CCNB would guarantee the remainder of the payments.

Jerry Gates stated in his affidavit that CCNB never guaranteed and never represented to Garner that it would guarantee Mercantile Texas' obligation to Garner under his 1983 agreement with Mercantile Texas or that it would guarantee MCorp's obligation to Garner under his 1984 agreement with MCorp.

The 1980 Commitment did not show that CCNB promised to guarantee payment of the MCorp ESP benefits to Garner, and no other agreement existed to guarantee those benefits. Therefore, CCNB had no liability to pay the ESP benefits.

CCNB's third attack on the contract claim was that it fully performed all the obligations under the 1980 Commitment. To prove breach of contract, a party must show 1) the existence of the contract sued upon, 2) compliance with the terms of the contract, and 3) the other party's breach of that contract. *St. Paul Ins. Co. v. Rakkar*, 838 S.W.2d 622, 629 (Tex. App. – Dallas 1992, writ denied).

The 1980 Commitment provided that Garner was to continue working for CCNB subject to health and his ability to perform. The contract stated the salary he was to receive, along with other benefits.

In his affidavit, Jerry Gates stated that according to the records in Garner's payroll and personnel files at CCNB, Garner received all the benefits which the 1980 Commitment required CCNB to pay him. His salary and other benefits were paid to him in accordance with the

1980 Commitment through December 1, 1986, the date of his retirement. At that time, he also received a lump-sum payment of $584,115.41 with respect to his MCorp retirement Plan and $88,081.14 from his Money Max Plan. Garner and his wife remained eligible for medical insurance and received a $5,000 life insurance policy on Garner's life. CCNB paid Garner a consulting fee, calculated at $100,000 per year, from December 1, 1986 through December 31, 1990.

Since CCNB paid all the salary and benefits to Garner which the 1980 Commitment required it to pay, CCNB fully performed the contract, and no breach of contract occurred. *See Rakkar*, 838 S.W.2d at 629. We hold that the trial court did not err by granting summary judgment for CCNB on the breach-of-contract claim. We overrule points one and two.

By point six, the Garners assert that the court erred in granting summary judgment on their reliance claim because CCNB did not move for summary judgment on that claim.

The Garners' summary judgment motion asserted the reliance claim as an alternative if the trial court did not find that a contract was established as a matter of law. The trial court granted CCNB's summary judgment motion on *all* grounds. The trial court, by granting CCNB's summary judgment motion on the contract claim, found that a contract was established. This finding excluded the reliance claim. CCNB did not have to move for summary judgment on that claim. We overrule point six.

By point eight, the Garners assert that the court erred in granting summary judgment on their fraud claim, and by point thirteen, they assert that the court erred in granting summary judgment on their negligent-misrepresentation and tortious interference-with-contract claims. They base their assertions on the fact that CCNB did not move for judgment on these claims.

CCNB did not move for summary judgment on these claims. Accordingly, even though they may appear to have no merit in view of our disposition of the contract claim, the related claims may not be summarily disposed of absent their inclusion in the motion for summary judgment. *See Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). However, CCNB's position is that the Garners did not plead these claims.

A court should uphold the petition containing a cause of action that a person may reasonably infer from what is specifically stated, even if an element of the cause of action is not specifically alleged. *Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347, 354 (Tex. 1995); *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). Still, pleadings must give reasonable notice of the claims asserted. *Doe*, 903 S.W.2d at 354.

The elements of actionable fraud are: 1) that a material representation was made; 2) that it was false; 3) that when the speaker made it he knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; 4) that he made it with the intention that the party should act upon it; 5) that the party acted in reliance upon it; and 6) that he thereby suffered injury. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex.

1990), *cert. denied*, 498 U.S. 1048 (1991); *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

To prevail on a negligent-misrepresentation suit, the plaintiff must prove that: 1) the defendant made the representation in the course of its business or in a transaction in which it has a pecuniary interest; 2) the defendant supplied false information for the guidance of others in their business; 3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and 4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *Southwestern Clinic of Bone & Joint Diseases v. Farmers Ins. Group*, 850 S.W.2d 750, 753 (Tex. App. – Corpus Christi 1993, no writ); *First Interstate Bank v. S.B.F.I., Inc.*, 830 S.W.2d 239, 245 (Tex. App. – Dallas 1992, no writ).

The Garners' third-amended petition alleged that Garner and CCNB entered into an agreement on August 4, 1980, that CCNB partially performed the agreement, but that it did not totally perform all the terms and conditions of the agreement. Paragraph V of the petition stated that "as a consequence of the Defendant's [CCNB's] representations upon which the Plaintiffs reasonably relied, the Plaintiffs have suffered damages. . . ." This paragraph was separate from the Garners' remaining claims in their third-amended petition.

The allegations show that CCNB made representations to the Garners which they relied upon. CCNB's failure to perform the agreement caused them damages. These allegations gave CCNB reasonable notice that the Garners were asserting claims for fraud and negligent misrepresentation. *See DeSantis*, 793 S.W.2d at 688; *Stone*,

554 S.W.2d at 185; *Farmers Ins.*, 850 S.W.2d at 753; *S.B.F.I., Inc.*, 830 S.W.2d at 245.

The elements of tortious interference with prospective contract are: 1) a reasonable probability that the parties would have entered into a contractual relationship; 2) an intentional and malicious act by the defendant that prevented the relationship from occurring with the purpose of harming the plaintiff; 3) the defendant lacked privilege or justification to do the act; and 4) actual harm or damage resulted from the defendant's interference. *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 659 (Tex. App. – Corpus Christi 1991, writ denied).

The allegations in the third-amended petition were not sufficient to place CCNB on notice that the Garners were alleging a cause of action for tortious interference with contract.

Since CCNB did not move for summary judgment on the Garners' fraud and negligent-misrepresentation claims, it was not entitled to summary judgment on those claims. *Chessher*, 658 S.W.2d at 564. We sustain point eight. We sustain point thirteen relating to the Garners' negligent misrepresentation claim, and we overrule that part of point thirteen relating to the tortious interference claim.

By point eleven, the Garners assert that the trial court erred in granting summary judgment for CCNB on their DTPA claim because a fact issue exists whether Garner was a consumer.

CCNB moved for summary judgment on the basis that Garner was not a consumer as a matter of law. The

question of whether a plaintiff is a consumer under the DTPA is a question of law for the trial court. *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App. – Fort Worth 1991, writ denied); *Reed v. Israel Nat'l. Oil Co.*, 681 S.W.2d 228, 233 (Tex. App. – Houston [1st Dist.] 1984, no writ).

In *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 351 (Tex. 1987), the supreme court stated that DTPA plaintiffs must qualify as consumers, as that term is defined in section 17.45(4) of the DTPA[1] to maintain a private cause of action under section 17.50 of the Act. To establish DTPA consumer status, a plaintiff must have sought or acquired goods or services by purchase or lease, and goods or services purchased or leased must form the basis of the complaint. *Barnes*, 741 S.W.2d at 351-52; *Johnson v. DeLay*, 809 S.W.2d 552, 554 (Tex. App. – Corpus Christi 1991, writ denied).

The word "goods" means tangible chattels or real property purchased or leased for use, and the word "services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods. TEX. BUS. & COMM. CODE ANN. § 17.45(1), (2), (Vernon 1987).

A case that helps to resolve the issue in this point is *Baker v. Missouri Pac. Truck Lines, Inc.*, 616 S.W.2d 389 (Tex. Civ. App. -- Houston [1st Dist.] 1981, no writ). In that case, Baker signed a contract with Missouri Pacific (MoPac) to deliver freight. MoPac ended the contract, and

---

[1] Section 17.45(4) provides in pertinent part: "'Consumer' means an individual, partnership, corporation . . . who seeks or acquires by purchase or lease, any goods or services. . . . "

Baker sued it under the DTPA. MoPac moved for summary judgment on the ground that Baker was not a consumer. The appellate court stated:

> Baker did not acquire any tangible chattels or real property from Missouri Pacific. Neither did he purchase or lease for use any work, labor or service. Baker sought to enter into a contract whereby he would be able to furnish service to Missouri Pacific for a consideration. . . .
>
> The term "services" includes an activity on behalf of one party by another. "Services" is similar in nature to work or labor. *Riverside National Bank v. Lewis*, 603 S.W.2d 169 (Tex. 1980). As a matter of law Baker was not a "consumer" as defined in the Deceptive Trade Practices Act. . . .

Baker, 616 S.W.2d at 392-93.

In the instant case, Garner did not acquire by purchase or lease any tangible or real property. He also did not purchase or lease for use any work, labor, or services. He entered into the 1980 Commitment to furnish services to CCNB for consideration. Based on these facts, Garner was not a consumer as defined in the DTPA. *See* TEX. BUS. & COMM. CODE ANN. § 17.45(1), (2), (4) (Vernon 1987); *Baker*, 616 S.W.2d 392-93.

The Garners argue that during Garner's employment with CCNB, he sought retirement benefits from it and that retirement benefits are "goods" or "services" under the DTPA. However, the evidence showed that CCNB did not adopt the MSP or the ESP for Garner's benefit. Although Garner may have desired retirement benefits under the 1980 Commitment, he did not acquire any MSP

or ESP benefits under the contract. We hold that the trial court did not err by granting summary judgment on the Garners' DTPA claim. We overrule point eleven.

By point twelve, the Garners argue that the trial court erred in granting summary judgment on their Personnel Employment Services Act (PESA) claim because a fact issue exists whether CCNB was an employment agency under PESA.

PESA protects a person from improper conduct by another who acts as a personnel service in the capacity of an owner, operator of the service, counselor, or agent or employee of the service. TEX. REV. CIV. STAT. ANN. art. 522la-7, § 3(a) (Vernon Supp. 1997).

CCNB moved for summary judgment on the basis that PESA applies to personnel services that supply labor to third parties and does not apply to two-party employment contracts.

PESA states that personnel service means:

> a person who for a fee or without a fee offers or attempts to procure directly or indirectly permanent employment for an employee or procures or attempts to procure a permanent employee for an employer. . . . The term includes a person who offers the facilities of or advertises as:
>
> (A) an executive search or consulting service;
>
> (B) an out-placement service;
>
> (C) an overseas placement service;
>
> (D) a job listing service;
>
> (E) a personnel consulting service; or

> (F) a resume service that provides job market investigation, research, or evaluation.

TEX. REV. CIV. STAT. ANN. art. 5521 a-7, § 1 (5) (Vernon Supp. 1997).

Jerry Gates stated in his affidavit that CCNB had a personnel department which handled its personnel functions. The department was involved only in the handling of employment inquiries from persons who were interested in working for CCNB. The department did not act as a personnel service for persons seeking employment from a third party. This department never attempted to procure permanent employment for an employer other than CCNB. CCNB was not involved in the employment or personnel services business. It has never acted as an executive search or consulting service, an out-placement service, or an overseas placement service. It was not a job listing service, a personnel-consulting service, or a resume service that provided job-market investigation, research, or evaluation.

This evidence showed that CCNB did not serve as a personnel service. Therefore, it was not subject to any violation of PESA. We hold that the trial court did not err when it granted summary judgment on the Garners' PESA claim. We overrule point twelve.

By point fourteen, the Garners assert that the trial court abused its discretion in granting CCNB's motion to strike their fourth-amended petition.

The court heard CCNB's summary judgment motion on June 10, 1994, and on December 22, 1994. On January 6, 1995, the Garners filed their fourth-amended petition which included a claim for tortious interference with

contract. CCNB did not move for summary judgment on that claim because when its motion was filed and heard, the claim was not part of the Garners' suit. CCNB filed its motion to strike the fourth-amended petition on the grounds that the Garners did not seek or obtain leave of court to file it. The trial court found that the Garners did not obtain leave of court to file their fourth-amended petition and that they untimely filed it. The court did not consider the fourth-amended petition.

According to Texas Rules of Civil Procedure 63 and 66, a trial court has no discretion to refuse an amendment unless: 1) the opposing party presents evidence of surprise or prejudice; or 2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990).

In the instant case, since the fourth-amended petition asserted a new cause of action, it was prejudicial on its face. Due to CCNB's objection to it, the trial court had discretion to refuse the amended pleading. *See Greenhalgh*, 787 S.W.2d at 939. We hold that the trial court did not abuse its discretion by refusing the amended pleading. We overrule point fourteen.

Due to our disposition of the above points, we need not address the remaining points of error. TEX. R. APP. P. 90(a).

We REVERSE the judgment and REMAND the case for further proceedings on the fraud and negligent-misrepresentation claims. We AFFIRM the remainder of the judgment.

/s/ Robert J. Seerden
ROBERT J. SEERDEN,
Chief Justice

Opinion ordered published.
Tex. R. App. P. 90.

Opinion delivered and filed
this the 10th day of April, 1997.

APPENDIX A-2

Opinion Of The Court Of Appeals For The Thirteenth Judicial District Of Texas Overruling Appellants' Motion For Rehearing

[LOGO]

NUMBER 13-95-105-CV
COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI

JOHN GARNER AND WIFE,
LANELLE H. GARNER,

Appellants,

v.

CORPUS CHRISTI NATIONAL BANK,

Appellee.

On Appeal from the 214th District Court
of Nueces County, Texas.

OPINION ON MOTIONS FOR REHEARING

Before Chief Justice Seerden and Justices Yañez and Chavez Opinion on Motions for Rehearing by Chief Justice Seerden

Both appellants and appellee have filed motions for rehearing. While we overrule the motions for rehearing, we write to address the complaints raised therein.

Appellants complain, among other things, that this Court failed to address their ERISA[1] claims, and that the Bank never moved for summary judgment on their reliance claim. By their fourth and fifth points of error,

[1] Employee Retirement Income Security Act of 1974. See 29 U.S.C. § 1001 *et seq.*

appellants complain that the trial court erred in granting summary judgment on their ERISA claims because appellee never moved for summary judgment on those claims and the evidence raised a fact issue thereon.

By Plaintiffs' Third Amended Original Petition, appellants specifically pleaded breach of the employment agreement. After stating their breach of contract theory, the appellants pleaded the following:

> IV.
>
> Alternatively, as a consequence of the [Bank's] representations, the [Garners] are entitled to the benefits described in the Executive Security Plan, and, in addition, are entitled to reasonable attorney's fees, under applicable federal law. *See* Chapter 18 of Title 29 of the United States Code. [ERISA]

By its summary judgment motion, the Bank contended that it was entitled to prevail on all causes of action pleaded by the Garners. In particular, the Bank asserted that it did not breach the Executive Security Plan alleged by the Garners. Breach of that plan by failure to pay the required benefits was a necessary element of both the contract claim and the ERISA claim raised in state court. *See* 29 U.S.C. § 1132(a)(1)(B) & (e)(1); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 n.1 (Tex. 1994). Accordingly, the Bank was entitled to summary judgment on the ERISA claim, as well as the contract claim urged by the Garners. The ERISA claim encompasses the state-law claim for benefits due, and accordingly is dependent upon a finding that the Bank breached its duty to provide such benefits. If our original opinion was not sufficiently

clear, we herein overrule appellants' fourth and fifth points of error.

By their sixth point of error, appellants also complain that the Bank never moved for summary judgment on their reliance claim. Their Third Amended Original Petition stated the following claim:

V.

> Alternatively, as a consequence of the [Bank's] representations upon which the [Garners] reasonably relied, the [Garners] have suffered damages in an amount that exceeds the minimum jurisdictional limits of this Court.

However, Texas courts have recently denied the existence of a separate cause of action in tort for detrimental reliance. *See University of Texas System v. Courtney*, 1997 WL 216212*7 (Tex. App. – Fort Worth May 1, 1997, n.w.h.). Neither have we found any authority to suggest that "reliance" by itself is an independent cause of action. Rather, it is an element of other causes of action in which the tortious or unlawful conduct of the defendant is "relied upon" to the detriment of the plaintiff.

Accordingly, in the present case, paragraph five of the Garner's petition did not set out a "reliance" claim that had to be addressed in the summary judgment motion as a separate cause of action, but merely pleaded reliance as a part of its other claims in contract and tort. We properly overruled appellants' sixth point of error.

This brings us to the Bank's complaint on rehearing that fraud and misrepresentation claims were never

raised in the pleadings and should not have been remanded for trial.

A court should uphold the petition as to a cause of action that may be reasonably inferred from what is specifically stated, even if an element of the cause of action is not specifically alleged. *Smithkline Beecham*, 903 S.W.2d at 354-55. We have already set out in our opinion the elements of fraud and negligent misrepresentation, both of which include the necessary elements of misrepresentation and reliance. *See DeSantis*, 793 S.W.2d at 688; *Southwestern Clinic*, 850 S.W.2d at 753. As these elements were specifically alleged in paragraph five of the petition, we conclude that the Garner's petition fairly plead a cause of action for fraud or misrepresentation.

We overrule both motions for rehearing.

/s/ Robert J. Seerden
ROBERT J. SEERDEN,
Chief Justice

Opinion on Motion for Rehearing ordered published. Tex. R. App. P. 90.

Opinion on Motion for Rehearing delivered and filed this the 22nd day of May, 1997.

APPENDIX B-1

Excerpts From Third Amended Original Petition Filed In The 214th Judicial District Court, Nueces County, Texas, Raising ERISA Claims

NO. 92-1938-F

JOHN H. GARNER and wife, LANELLE H. GARNER	§	IN THE DISTRICT COURT
Plaintiffs,	§	214 JUDICIAL DISTRICT
vs.	§	NUECES COUNTY, TEXAS
CORPUS CHRISTI NATIONAL BANK,	§	
Defendant.	§	

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

(Filed July 11, 1994)

THE HONORABLE JUDGE OF SAID COURT:

COMES NOW John H. Garner and wife, Lanelle H. Garner, Plaintiffs, complaining of Corpus Christi National Bank, Defendant, and for cause of action respectfully show as follow:

* * *

IV.

Alternatively, as a consequence of the Defendant's representations, the Plaintiffs are entitled to the benefits described in the Executive Security Plan, and, in addition, are entitled to reasonable attorney's fees, under applicable federal law. *See* Chapter 18 of Title 29 of the United States Code.

* * *

WHEREFORE, Plaintiffs pray that upon trial of this cause to a jury, they have judgment for their actual damages as requested herein, pre-judgment interest at the earliest time allowed by law and at the highest rate allowed by law, reasonable and necessary attorney's fees incurred in the prosecution of this action, . . . which judgment should bear post-judgment interest at the earliest time provided by law and the highest rates provided by law, and for all such other relief, special or general, at law or in equity, to which the Plaintiffs may be justly entitled.

Respectfully submitted,

HARRIS & THOMAS
P.O. Drawer 1901
Corpus Christi, Texas 78403
(512) 883-1946
(Fax) 882-2900

By: /s/ James R. Harris by AMG
James R. Harris
State Bar No. 09066000

APPENDIX B-2

Plaintiffs' Supplemental Response To Defendant CCBN's Motion For Summary Judgment Raising ERISA Claims

NO. 92-1938-F

JOHN H. GARNER and wife, LANELLE H. GARNER, Plaintiffs,	)	IN THE DISTRICT COURT
	)	214TH JUDICIAL DISTRICT
	)	NEUCES COUNTY, TEXAS
vs.	)	
CORPUS CHRISTI NATIONAL BANK, Defendant.	)	

TO THE HONORABLE JUDGE OF SAID COURT:

GARNER'S SUPPLEMENTAL RESPONSE TO DEFENDANT CCNB'S MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs, John H. Garner and Lanelle H. Garner, and file this their Supplemental Response to Defendant CCNB's Motion for Summary Judgment, and in support thereof respectfully show this Court as follows:

I.

This Supplemental Response is intended to supplement the Response to Defendant CCNB's Motion for Summary Judgment filed with this Court on June 2, 1994, and is filed pursuant to this Court's leave to file same.

* * *

III.

This Court should deny the Defendant's Motion for Summary Judgment on the grounds that the summary judgment evidence raises a material issue of fact as to whether CCNB established an ERISA plan for the benefit of its employee, Garner. Accordingly, summary judgment would be improper.

* * *

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, John H. Garner and Lanelle H. Garner respectfully request this Court to deny the Defendant's Motion for Summary Judgment and to grant them all other relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

HARRIS & THOMAS
P.O. Drawer 1901
Corpus Christi, Texas 78403
(512) 883-1946
(Fax) 882-2900

By: /s/ James R. Harris
by AMG
James R. Harris

State Bar No. 09066000

APPENDIX B-3

Final Judgment
Of The 214th Judicial District Court,
Nueces County, Texas

CAUSE NO. 92-1938-F

JOHN H. GARNER, AND WIFE, LANELLE H. GARNER	*	IN THE DISTRICT COURT
VS.	*	214TH JUDICIAL DISTRICT
CORPUS CHRISTI NATIONAL BANK	*	NEUCES COUNTY, TEXAS

AMENDED FINAL SUMMARY JUDGMENT

On June 10, 1994, the Court heard the Motion for Summary Judgment filed in this cause by Defendant, Corpus Christi National Bank. On December 22, 1994, the Court heard the Motion for Summary Judgment filed by the Plaintiffs, John H. Garner and Lanelle H. Garner, as well as additional arguments in support of Defendant Corpus Christi National Bank's Motion for Summary Judgment. All parties appeared by and through their respective counsel at both hearings.

The Court, after examining the pleadings on file on December 22, 1994, reviewing the summary judgment evidence before the Court, and hearing the arguments of counsel, determines that the Defendant, Corpus Christi National Bank, is entitled to summary judgment on all grounds. The Court also determines that the Motion for Summary Judgment filed by the Plaintiffs, John H. Garner and Lanelle H. Garner, should be denied in all respects. The Court further determines that Plaintiffs' Fourth Amended Petition, which was filed on January 6, 1995, after all Motions for Summary Judgment had been heard by this Court, was untimely filed and filed without

leave of Court. Therefore, this Court did not consider Plaintiffs' Fourth Amended Original Petition.

The Court also determines that the counterclaim of Defendant, Corpus Christi National Bank, against John H. Garner and Lanelle H. Garner under Tex. Bus. & Comm. Code Ann. §17.50(c), should be severed from this action and made the subject of a separate action and that it proceed to final judgment or other disposition in this Court under the style of Corpus Christi National Bank vs. John H. Garner and wife, Lanelle H. Garner, and bear the docket number 95.1719.F. It is further ORDERED that separate judgments be entered in the severed causes, each judgment to be final and to dispose completely of all the issues between all the parties in the respective suits. All other relief not expressly granted is denied.

SIGNED AND ORDERED ENTERED this 3 day of March, 1995.

/s/ Mike Westergren
JUDGE PRESIDING

APPENDIX B-4

Plaintiffs' Motion For New Trial And/Or Motion For Reconsideration Filed In The 214th Judicial District Court, Nueces County, Texas, Raising ERISA Issues

NO. 92-1938-F

JOHN H. GARNER and wife, LANELLE H. GARNER, Plaintiffs, vs. CORPUS CHRISTI NATIONAL BANK, Defendant.	))))))))	IN THE DISTRICT COURT 214TH JUDICIAL DISTRICT NEUCES COUNTY, TEXAS

MOTION FOR NEW TRIAL AND/OR MOTION FOR RECONSIDERATION

(Filed February 28, 1995)

COMES NOW John Garner and Lanelle H. Garner and file this their Motion for New Trial and/or Motion for Reconsideration and in support thereof would respectfully show this Court as follows:

I. INTRODUCTION & BACKGROUND

1. On or about May 20, 1994, the Defendant filed its motion for summary judgment.

2. On or about June 2, 1994, Plaintiffs filed their Response to Defendant's motion for summary judgment. On July 11, 1994, the Plaintiffs filed a supplemental response to the Defendant's motion for summary judgment. On September 28, 1994, the Defendant filed a reply to Plaintiffs' supplemental response. On December 15, 1994, the Defendant filed a supplemental response to Plaintiffs' motion for summary judgment.

* * *

4. On June 10, 1994, and again on December 22, 1994, this Court heard the Plaintiffs' and the Defendant's motions for summary judgment. At the time the motions for summary judgments were heard, the Plaintiffs had filed their Third Amended Original Petition, which had been filed July 11, 1994.

5. On February 16, 1995, this Court entered a Final Summary Judgment in which it granted Defendant's Motion for Summary Judgment and denied the Plaintiffs' Motion to Summary Judgment.

6. The Final Summary Judgment entered by this Court on February 16, 1995 is erroneous for the following reasons:

* * *

III. ERISA CLAIMS

13. The Summary Judgment is also or alternatively erroneous because the summary judgment evidence raises a material issue of fact as to whether the August 4, 1980, Commitment was an informal ERISA plan under federal law. The summary judgment evidence raises a material issue of fact relating to whether Defendant "established or maintained" an employee benefit plan.[2] To the extent

---

[2] Under ERISA, liability arises *statutorily*, not as a result of contract. The statutory test of whether an employer is liable for benefits is whether the employer "established or maintained" an employee benefit plan. *See* 29 U.S.C. § 1002(a), (2)(A); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240 (5th Cir. 1990); *Donovan v. Dillingham*, 688 F.2d 1367, 1372

that there is evidence that Defendant "established or maintained" an employee benefit plan, an issue of fact is raised as to whether Defendant is liable under ERISA. The summary judgment evidence which raises an issue of fact as to whether an "informal" ERISA plan was "established or maintained" by CCNB includes, but is not limited to, the following:

(1) The Defendant made the original promise and representation to Garner, its employee, that he would receive employee benefits in the form of periodic payments from an unfunded plan [RMSJ, DX-A];

(2) The Defendant played a significant role in the administration of the ESP and its benefits, and any evidence of "some meaningful degree of participation by the employer in the creation or administration of the plan" is sufficient to raise an issue of fact as to whether the employer "established or maintained" an employee benefit plan informally. *See Hansen v. Continental Insurance Co.*, 940 F.2d, 971, 977 (5th Cir. 1991):

   (a) Any premium and accrual of benefits were to be charged back to the Defendant by MCorp through invoices from MCorp [RMSJ, DX-E, F.]

   (b) In its September 27, 1990, offering circular, the Defendant represented the ESP to be an employee benefit plan of its employees. [RMSJ, DX-G.]

(11th Cir. 1982). Accordingly, an employer may be liable under ERISA even though it may not be liable under state-law principles of contract. Thus, because there is evidence that CCNB "established or maintained" an employee benefit plan informally, the issue of whether it "adopted" it or not is not relevant.

(c) The Defendant was an intermediary in handling the payment of benefits under the plan. For example, Mr. Gulbrandsen, the personnel director of the Defendant, was involved in the issuing of monthly payments [RMSJ, DX-J.] The personnel department of the Defendant played a central role in handling the application, payment, and complaints relating to employee benefits. [Gates Depo., pp. 57-61, RMSJ, DX-M.]

(d) The Defendant showed the ESP as being its own plan in its personnel files. [RMSJ, DX-I, Gulbrandsen Depo., pp. 20-21, RMSJ DX-O.] Jerry Gates, President of the Defendant, testified that matters in the Defendant's personnel files would relate to that person's employment relationship with the bank. [Gates Depo, p. 13, RMSJ, DX-M.]

(e) There is summary judgment evidence that indicates that MCorp acted as agent for CCNB with regard to CCNB's employee benefit plans. [Garner Aff., Paragraphs 5, 6, RSMJ, DX-W.]

(f) Garner relied on the representations of CCNB that it would receive certain benefits in foregoing other employment opportunities.

(g) CCNB was Garner's employer, not MCorp.

(3) In its pleadings in federal court, the Defendant judicially admitted that as Garner's employer, it had established an ERISA plan for the benefit of Garner. [Supp. RSMJ, DX-6 (Notice of Removal).]

(4) Additionally, summary judgment evidence raises an issue of fact that the Defendant "established or maintained" an informal ERISA plan as a result of the following:

(a) the intended benefits (monthly payments following retirement) could be ascertained by Garner, the beneficiary at the time they were promised;

(b) the employee knew of the source of financing the benefits (an unfunded plan, to be paid out of the general assets of the employer);

(c) the class of beneficiaries was known by the employee (Gates and Garner)

(d) the procedures for receiving benefits under the plan was ascertainable by Garner.

[Garner Aff., PMSJ, Paragraphs 5, 6.]

Under federal law, the summary judgment evidence is sufficient to raise an issue of fact of whether the Defendant "established or maintained" and [sic] ERISA plan. *See e.g., Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991). The summary judgment is therefore in error.

* * *

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court grant their Motion for New Trial and Motion for Reconsideration and vacate its Final Summary Judgment, enter summary judgment in favor of the Plaintiffs on the issue of liability and set this case for trial for the determination of damages, or, in the alternative, vacate its Final Summary Judgment and set this case for

trial on the merits, and to grant all such other relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

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By: /s/ AM Greenwell
James R. Harris

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APPENDIX B-5

Order Of The 214th Judicial District Court, Nueces County, Texas, Overruling Plaintiffs' Motion For Reconsideration

NO. 92-1938-F

JOHN H. GARNER and wife, LANELLE H. GARNER, Plaintiffs,	§	IN THE DISTRICT COURT
	§	214TH JUDICIAL DISTRICT
	§	NUECES COUNTY, TEXAS
VS.	§	
CORPUS CHRISTI NATIONAL BANK, Defendant.	§	

ORDER ON PLAINTIFFS' MOTION FOR NEW TRIAL AND/OR MOTION FOR RECONSIDERATION

BE IT REMEMBERED that on this the ___ day of March, 1995, came on to be considered the Motion of John H. Garner and wife, Lanelle H. Garner, Plaintiffs, for New Trial and/or for Reconsideration, and the court having reviewed said Motion is of the opinion that it should be in all respects DENIED.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiffs' Motion for New Trial and/or Motion for Reconsideration and each and every matter raised therein is in all things DENIED.

SIGNED AND ENTERED this 3 day of March, 1995.

/s/ Mike Westergren
JUDGE PRESIDING

APPENDIX C-1

Excerpts Of Appellants' Brief Filed In The Thirteenth Court Of Appeals Raising ERISA Issues

CASE NO. 13-95-105-CV

IN THE COURT OF APPEALS FOR THE
THIRTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS CORPUS CHRISTI, TEXAS

****

JOHN H. GARNER, AND WIFE,
LANELLE H. GARNER,

Appellants,

VS.

CORPUS CHRISTI NATIONAL BANK,

Appellee.

****

BRIEF OF APPELLANTS

On Appeal from the 214th Judicial District Court
Corpus Christi, Nueces County, Texas

TO THE HONORABLE JUSTICES OF THIRTEENTH COURT OF APPEALS:

Appellants, John H. Garner, and wife, Lanelle H. Garner, submit this brief in appeal of a summary judgment rendered in favor of Appellee, Corpus Christi National Bank. This appeal is from the 214th Judicial District court of Nueces County, Texas, the Honorable Mike Westergren presiding.

* * *

POINT OF ERROR NO. 5

* * *

THE TRIAL COURT ERRED IN GRANTING CCNB SUMMARY JUDGMENT ON GARNER'S CLAIMS UNDER

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, 29 U.S.C. § 1001, *et seq.* ("ERISA") BECAUSE THE SUMMARY JUDGMENT EVIDENCE RAISES A MATERIAL ISSUE OF FACT AS TO WHETHER CCNB IS LIABLE FOR BENEFITS UNDER ERISA BASED UPON IT ESTABLISHING OR MAINTAINING AN INFORMAL ERISA PLAN.

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III. GARNER'S ERISA CLAIMS

* * *

A. Introduction

The trial court erred in entering summary judgment against Garner on his ERISA claims. . . . [T]he summary judgment evidence interpreted in a light most favorable to Garner raises a material issue of fact as to whether CCNB established or maintained an "informal plan" under ERISA.

* * *

C. Summary Judgment Evidence Raises Issue of Fact of Informal ERISA Plan

The trial court's summary judgment is erroneous in another respect. The summary judgment evidence is replete with evidence that raises fact issues as to whether CCNB established an informal ERISA plan. This evidence precludes a summary judgment. Before addressing the summary judgment evidence, however, an overview of federal law relating to ERISA is appropriate.

1. ERISA Background

In a comprehensive attempt to reform the rights of employees with respect to retirement benefits, the United States Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"). The legislation represents a conscious effort on the part of the federal government to "protect the integrity" of employee benefit plans and to secure "the expectations of their participants and beneficiaries" in those plans. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 929 (3rd Cir. 1985). The whole intent of Congress in passing ERISA was to "make[e] sure that if a worker had been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are a requirement to obtain a vested benefit – he will actually receive it." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 1733, 64 L.Ed. 2d 354 (1980)).

2. ERISA Preempts State Law; State Court's [sic] Have Concurrent Jurisdiction

ERISA claims preempt state law claims. Under ERISA, courts (both federal and state) are charged with developing and enforcing a federal common law to the exclusion of state common law and statutes. *See* 29 U.S.C.A. § 1144(a) (West 1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S. Ct. 2890, 2897, 77 L. Ed. 2d 490 (1983). State courts have concurrent jurisdiction with federal courts to entertain civil actions brought by a participant in an ERISA plan to recover benefits or enforce his rights under the plan pursuant to 29 U.S.C.

§ 1132(a)(1)(B). *See* 29 U.S.C.A. § 1132(e)(1) (West 1985); *Ames v. Ames*, 776 S.W.2d 161 (Tex. 1989).

3. "Plan" Must Be "Established" or "Maintained by "Employer" for ERISA Liability to Exist

Under ERISA, the term "employee benefit plan" means "any plan, fund, or program" which is "established or maintained by an employer" for the purpose of providing employee benefits.[8] 29 U.S.C.A. § 1002(a), (2)(A), (3) (West Supp. 1994) The existence of a "plan, fund, or program" is a necessary precondition to the applicability of ERISA *See Harris v. Arkansas Book Co.*, 794 F.2d 358, 350 (8th Cir. 1986). Moreover, such a "plan, fund, or program" must be "established or maintained" before it is considered an ERISA plan subject to the ERISA provisions. *See Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 240 (5th Cir. 1990); *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). Further, the "plan, fund, or program" must be "established or maintained" by an "employer" for ERISA to apply. *Cf. Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176, 1180 (11th Cir. 1987).

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[8] An "employee welfare benefit plan" is defined as "any plan, fund, or program" which is "established or maintained by an employer" for the purpose of providing its employees with welfare benefits. 29 U.S.C.A. § 1002(1) (West Supp. 1994). Similarly, an "employee pension benefit plan" is defined as "any plan, fund, or program" which is "established or maintained by an employer" for the purpose of providing employees with pension benefits. 29 U.S.C.A. § 1002(2)(A) (West Supp. 1994).

4. Doctrine of "Informal Plan"

(a) *Four-prong Donovan Test*

Under federal law, an employer can "establish" or "maintain" a plan with very little action on its part. "[A] 'plan, fund, or program' under ERISA is established or maintained if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991) (citations omitted) (quoting *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*); 29 U.S.C. §§ 1002(1), 2(A)); *see also Hansen v. Continental Insurance Co.*, 940 F.2d 971, 977 (5th Cir. 1991) *and Landry v. Air Line Pilots Association International*, 901 F.2d 404, 415 (5th Cir. 1990) (both citing *Donovan* with approval for determining if ERISA plan is established). Thus, under the *Donovan* test, a plan is established or maintained by an employer if a reasonable person can ascertain: (i) the intended benefits; (ii) the class of beneficiaries; (iii) the source of financing; and (iv) the procedures for receiving benefits under the alleged plan. The *Donovan* elements should be applied in a "flexible" manner "consistent with the legislative approach to ERISA" so as to assure a maximum degree of protection to those entitled to retirement benefits. *Williams*, 927 F.2d at 1543.

Clearly, the *Donovan* test for determining whether an ERISA plan was "established" or "maintained" by an employer emphasizes the reasonable expectations of the *employee* with regard to the promises and unilateral representations of his employer. Additionally, proof that an employer "established" or "maintained" a plan can be

met by any evidence of "some meaningful degree of participation by the employer in the creation or *administration* of the plan." *Hansen v. Continental Insurance Co.*, 940 F.2d at 971, 977 (5th Cir. 1991) (emphasis added). Accordingly, in the context of a summary judgment proceeding, any evidence in the record, construed in the light most favorable to the employee, that CCNB had "some meaningful degree of participation . . . in the creation or administration of the plan" precludes summary judgment in favor of the employer because it raises a fact issue as to whether CCNB "established" or "maintained" an informal ERISA plan. *Id.*; *Nixon*, 694 S.W.2d at 548-49.

(b) *Formal Plan Not Required Under Donovan; Court May Look At all Manner of Documents*

A formal document between the employer and its employee is *not* required to establish or maintain an ERISA plan "otherwise, employers could avoid federal regulation [and liability] merely by failing . . . to memorialize their employee benefit programs in a separate document so designated." *Memorial Hospital*, 904 F.2d at 241. Thus, an oral representation to pay severance pay can establish an ERISA employee benefit plan, *cf. Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985), and a letter to a single employee representing entitlement to certain retirement benefits resulted in the establishment of an ERISA plan, *see William v. Wright*, 927 F.2d 1540, 1548 (11th Cir. 1991). Evidence relevant to the issue of the presence or absence of an informal employee benefit plan

would include "internal . . . documents, oral representations, . . . actual payment of benefits, . . . the reasonable understanding of employees, and the intentions of the putative sponsor." *Henglein v. Informal Plan for Plan Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 400 (3rd Cir. 1992). With regard to an employee's reasonable understanding, the "district court may consider the employee's background knowledge of particular documents . . . and whether any representations of the company incorporate the terms of those documents." *Henglein*, 974 F.2d at 400. In addition, "oral representations by a knowledgeable and authorized management employee of the company may be evidence of a benefit plan, especially if a representation incorporates by reference the terms of a document or other plan." *Henglein*, 974 F.2d at 400-01.

Whether a plan is "established" or "maintained" is an issue wholly governed by federal law and, to the extent state contractual principles conflict with the *Donovan* elements, the state contractu l principles (*e.g.*, the issue of the agreement of the parties, the proper construction of contractual terms, or whether a contract is sufficiently specific to be enforceable) should be disregarded under the preemption provisions of ERISA. *See* 29 U.S.C.A. § 1144(a) (West 1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S. Ct. 2890, 2897, 77 L.Ed. 2d 490 (1983).

5. If Informal Plan "Established" or "Maintained" by CCNB, it is Liable for Benefits Thereunder Under ERISA.

Section 1132 of Title 29 of the United States Code contains the civil enforcement provisions of ERISA. That section provides:

> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C.A. § 1132(a)(1)(B) (West 1985 & Supp. 1994).

The federal courts have recognized that an employee has a cause of action against his employer under 29 U.S.C. § 1132(a) to recover from his employer the benefits due him under an unfunded ERISA plan. *See Rockney v. Blohorn*, 877 F.2d 639-40 (8th Cir. 1989); *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 935-37 (3rd Cir. 1985).

In *Barrowclough* a former employee of Kidder Peabody named Barrowclough brought suit against his former employer, Kidder Peabody, for benefits he alleged he was owed under a "Top Hat" plan or "unfunded deferred compensation plan" established by his employer "for the benefit of select managerial and highly compensated

employees."[9] *Barrowclough*, 752 F.2d at 926. Barrowclough, the former employee, brought suit against his former employer alleging a variety of counts. Count I of Barrowclough's complaint sought damages and attorney's fees from Kidder Peabody pursuant to ERISA because of Kidder Peabody's failure to abide by the terms of the plan. The district court granted Kidder Peabody's motion for summary judgment, finding that Count I of the complaint failed to state a claim under ERISA. The third Circuit reversed the district court's summary judgment, holding that:

> [W]e have concluded that under 29 U.S.C. § 1132(a) plaintiffs have a federal cause of action [against their employer] for breach of the terms of a plan, that such an action may be brought either in federal or state court, and that federal common law is to be applied.

Barrowclough, 752 F.2d at 941.

The employer's liability under so-called "Top Hat" plans (i.e., plans maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees) was also recognized by the Eighth Circuit in *Rockney v. Blohorn*, 877 F.2d, 639-40 (8th Cir. 1989). In that case, the court observed:

> [A]s non-funded "Top Hat" plans "maintained by an employer primarily for the purpose of

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[9] Using similar language, the ESP describes its purpose as being one to establish an "unfunded benefit plan established and maintained for a select group of management or highly compensated employees."

> providing deferred compensation for a select group of management or highly compensated employees," they need not conform to the [ERISA] requirements for participation, vesting, funding and fiduciary responsibility. *An employer may be sued by participants in these plans to redress violations of ERISA or to enforce the terms of the plans.*

Rockney, 877 F.2d at 639-40 (citations omitted) (emphasis added).

In summary, if CCNB established or maintained an informal ERISA plan in favor of Garner, then CCNB is statutorily liable for its failure to provide those benefits promised Garner under the plan it established or maintained. CCNB could have established or maintained an informal ERISA plan if Garner could reasonably ascertain from the representations and documents relating to that representation (i) the intended benefits; (ii) the class of beneficiaries; (iii) the source of financing; and (iv) the procedures for receiving benefits. *See Landry*, 901 F.2d at 415; *Hansen*, 940 F.2d at 977. Any proof that CCNB had "some meaningful degree of participation . . . in the creation or administration of the plan" is evidence of CCNB's establishing or maintaining an informal ERISA plan. *Hansen*, 940 F.2d at 977. Because the summary judgment evidence construed in a light most favorable to Garner raises a material issue of fact as to whether CCNB established or maintained an informal ERISA plan for Garner's benefit, and that CCNB failed to provide him those benefits in accordance with the terms of the plan, the summary judgment entered by the trial court is in error.

6. Summary Judgment Raises Material Issue of Facts as to Whether CCNB "Established" or "Maintained" an "Informal Plan" under ERISA.

The summary judgment evidence raises a material issue of fact with respect to whether CCNB "established" or "maintained" an informal ERISA plan as a result of its 1980 Commitment and the role it played with respect to the ESP benefits after it was adopted by MCorp. Over the course of Garner's employment relationship with CCNB, a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and the procedures for receiving benefits. *See Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991). In addition, it is clear from the summary judgment evidence that a fact issue is raised as to whether CCNB had "some meaningful degree of participation . . . in the creation or adminsistraton" of the ESP. *Hansen*, 940 F.2d at 977.

(a) *Garner Affidavit Raises Fact Issue as to Informal Plan under Donovan because Garner Reasonably Ascertained Intended Benefits, Class of Beneficiaries, Source of Financing, and Procedures for Receiving Benefits*

The following summary judgment of John Garner is uncontroverted:

> I was aware at the time that I was declared eligible for the Management Security Program [sic] on March 29, 1983, and when I was declared eligible for the Executive Security Program [sic] on December 28, 1984, that ***I was the intended beneficiary*** of those Plans and that ***the benefits arising out of those Plans would be***

> ***pre-retirement death benefits and post-retirement income benefits.*** I also knew at the time that I was declared eligible for these Plans, that ***these plans were unfunded benefit plans.*** I was also aware at the time that I was declared eligible for the Management Security Program [sic] and the Executive Security Program [sic] that ***I would receive benefits under these Plans through either a lump-sum payment to my estate, or periodic payments to me upon my retirement.***

[Tr. 446-47 (emphasis added).]

Garner's uncontroverted affidavit alone raises a material issue of fact as to each element of the *Donovan* test for establishing or maintaining an informal plan. Clearly, in light of this evidence, the trial court was in error in granting summary judgment on Garner's ERISA claim. However, there is additional summary judgment evidence to corroborate Garner's testimony.

(b) *Various Documents and Deposition Testimony Corroborate Garner's Uncontroverted Affidavit; Thus Further Raising Fact Issue as to Informal Plan under Donovan*

The summary judgment evidence, construed in a light most favorable to the non-movant, raises additional issues of fact as to whether a reasonable employee, given the background circumstances and the parties' knowledge of the kind of benefits associated with the "Management Security Plan" referred to in the Commitment, could ascertain the intended benefits to be retirement and death benefits. *See Henglein*, 974 F.2d at 400 (documents to

be considered in determining employee's reasonable expectations). The "Management Security Plan," promised in the Commitment, is found in the paragraph of the Commitment dealing quite clearly with other retirement benefits that were promised Garner. This would have put any reasonable employee under the impression that CCNB was promising retirement benefits. Further, the Commitment's reference to the "Management Security Plan" is an express reference to, and an implicit incorporation of, a particular set of documents bearing the name "Management Security Plan," which clarify the terms and benefits promised by CCNB. This court "may consider the employee's background knowledge of particular documents . . . and whether any representations of the company incorporate the terms of those documents" in determining an employee's reasonable understanding that his employer intended to establish or maintain an ERISA plan. *Henglein*, 974 F.2d at 400. Moreover, it is clear from the terms of the Commitment and the terms of the MSP and ESP that the intended beneficiary was John Garner himself and the benefits were retirement benefits.

Garner could reasonably ascertain that the source of financing for the promised benefits would come from the general assets of his employer, CCNB, and MCorp (or Mercantile Texas), the administrator of the plan, since the plan described by the Commitment was an unfunded benefit plan which was to be paid out of current income. The Commitment interpreted in light of (i) the actual MSP and ESP documents, (ii) correspondence between Garner and MCorp., (iii) correspondence between MCorp and CCNB, and (iv) filed documents in Garner's personnel file all indicate that Garner's employee benefits

would come from general assets and that no independent fund would be established from which the benefits would be paid. No more than this is required to meet this prong of the *Donovan* test. The mere fact that "the payment of benefits [comes] out of an employer's general assets does not affect the threshold question of ERISA coverage." *Wiliams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991) *and authorities therein cited*.

Lastly, Garner could also ascertain the procedures for receiving benefits under CCNB's informal plan. The procedures for receiving benefits are fully described in the MSP documents and in the ESP documents. In addition, the procedures for receiving benefits were more fully developed during the relationship between the parties. Gary Gulbrandsen, the personnel director of CCNB, knew that payment of benefits was to occur by monthly checks. [Tr. 313.] Under the *Donovan* analysis, a full description of the procedures for receiving benefits is not necessary; the *Donovan* requirement is met even if the procedures are "simple," so long as they are "sufficiently ascertainable." *Williams*, 927 F.2d at 1544. In this case, the summary judgment evidence raises an issue of fact as to whether the procedures for the receipt of benefits were sufficiently established.

Clearly, in addition to Garner's uncontroverted affidavit which, in and of itself raises a fact issue on each element of the *Donovan* test, other summary judgment evidence raises a fact issue as to whether CCNB established an informal plan. Summary judgment on Garner's ERISA claim was improper.

(c) *Other Summary Judgment Evidence Raises Material Issue of Fact as to Whether CCNB Had Some Meaningful Degree of Participation in Creation or Administration of Plan Precluding Summary Judgment on Garner's ERISA Claim*

The summary judgment evidence additionally raises a material issue of fact that CCNB had "some meaningful degree of participation . . . in the creation or administration" of the MSP and ESP. *Hansen*, 940 F.2d at 977. Internal documents of CCNB and the deposition testimony of its officers also amply indicate that CCNB had an intermediate role in both *administering* the benefits due Garner under the ESP and in *funding* the benefits paid by MCorp until 1986, the administrator of the ESP.

The summary judgment evidence shows, for example, that CCNB intended to provide benefits to Garner. As is clear from the Commitment, CCNB intended to provide both salary incentives (e.g., salary, consultant fees) and other employment and post-employment benefits (e.g., insurance policy, incentive bonus, ESOP, ICESOP, Career Executive Stock Plan and "other benefits") to Garner in the hopes of enticing him to remain in its employment and forego the opportunity Garner had been offered by Valero. [Tr. 133; 325.]

That CCNB intended the ESP to be part of its benefits to its employees can be established from its public disclosures pertaining to the ESP and from its internal treatment of the ESP. In CCNB's Offering Circular dated September 27, 1990, CCNB admitted that "[m]any of the employee benefit plans covering the Bank's employees are administered and/or financed by MCorp." [Tr. 239.]

The ESP was handled no differently than CCNB's other employee benefit plans which were administered by MCorp. For example, CCNB's pension plan was administered by MCorp and called the "MCorp Pension Plan," although it was the pension plan CCNB offered to its employees. [Tr. 244.] Indeed, the Offering Circular included a discussion of the "MCorp ESP" plan as part of its discussion of *the Bank's* employees' pension benefit programs. [Id.] Gary Gulbrandsen, the principal personnel officer of CCNB, admitted that MCorp administered CCNB's plans. [Tr. 316.]

The internal files of CCNB likewise indicate that CCNB saw the ESP as part of the benefits it offered Garner. The personnel department of CCNB kept a copy of Garner's ESP in its personnel files, indicative that the ESP Program constituted an employee benefit arising out of Garner's employment with CCNB. [Tr. 268; Tr. 317.] The personnel files of CCNB listed the obligations of the "ESP" among the various other employee benefit obligations of CCNB with regard to Garner. [Tr. 314-15; 317; Tr. 272-73; 247.] Furthermore, the personnel department of CCNB handled various administrative matters relating to the ESP, such as how payments under the ESP would be made. [Tr. 317-19.] Moreover, CCNB was expected to make contributions toward the funding of the ESP plans covering its employees. [Tr. 186, 187.]

(d) *Fact Issue Raised as to Whether CCNB Judicially Admitted That It Had Established an ERISA Plan for Garner's Benefit*

Finally, in its attempts to remove this case from state court, CCNB judicially admitted, in various pleadings and papers filed with the federal district court, that it established or maintained an ERISA plan. For example, CCNB took the position that "the contract in question is a qualifying contract subject to ERISA provisions." CCNB also took the position that the ESP was "established by Corpus Christi National Bank, the employer of John Garner, for the purpose of providing [benefits] for its participants." [Tr. 544, 606.] Thus, the summary judgment evidence contains some evidence that CCNB admitted the existence of the pre-requisites of liability: the existence of an ERISA plan, fund, or program established or maintained by an employer. Because the parties do not dispute that Garner is entitled to his benefits (*i.e.*, that the benefits are fully vested), CCNB's admission necessarily raises an issue of fact as to its liability for the benefits promised Garner under the plan it established.

(e) *Conclusion*

In conclusion, the trial court erred in granting CCNB a summary judgment on Garner's ERISA claims because CCNB never moved for judgment on Garner's ERISA claims. Moreover, the summary judgment evidence raises a material issue of fact as to whether CCNB established or maintained an informal ERISA plan as a result of its 1980 Commitment, its relationship to McCorp, and its role relating to the administration of the benefits under

the ESP. Additionally, CCNB's judicial admission that it established or maintained an ERISA plan raises an issue of fact precluding summary judgment and directly contradicts the Affidavit of Jerry Gates, raising an inconsistency in that Affidavit precluding summary judgment. This Court should reverse the trial court's summary judgment and remand this case for a trial on the merits.

* * *

WHEREFORE, PREMISES CONSIDERED, Plaintiffs John H. Garner and wife, Lanelle H. Garner, respectfully request this court to sustain their points of error, reverse the trial court summary judgment and render judgment in their favor or remand for a trial on the merits, and to grant all other relief, at law or in equity, to which the Plaintiffs may be justly entitled.

Respectfully submitted,

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APPENDIX C-2

Excerpts From Appellants' Motion For Rehearing Filed In The Thirteenth Court Of Appeals Raising ERISA Issues

NO. 13-95-105-CV

IN THE COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

JOHN H. GARNER, AND WIFE, LANELLE H. GARNER,

Appellants,

VS.

CORPUS CHRISTI NATIONAL BANK,

Appellee.

APPELLANTS' MOTION FOR REHEARING

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

COME NOW John H. Garner, and wife, Lanelle H. Garner, Appellants, and file this their Motion for Rehearing in response to the opinion issued by this court on April 10, 1997, and request this Court consider the following points of error:

POINTS OF ERROR ON REHEARING

1. The Court of Appeals erred in failing to address the Appellants' Fourth and Fifth Points of Error. (Op. at 18)

2. The Court of Appeals erred in affirming the trial court's summary judgment with respect to the Appellants' ERISA claims and overruling the Appellants' Fourth and Fifth Points of Error because CCNB, the

Appellee and movant below, never raised the Garners' ERISA claims as grounds in its motion for summary judgment. (Op. at 18)

3. The Court of Appeals erred in affirming the trial court's summary judgment with respect to the Appellants' ERISA claims and overruling the Appellants' Fourth and Fifth Points of Error because a material issue of fact is raised by the summary judgment evidence that CCNB established or maintained an *informal* benefit plan for the benefit of its employee, John Garner. (Op. at 18)

* * *

ARGUMENT ON SELECTED POINTS

I. WHAT HAPPENED TO JOHN GARNER'S FEDERAL LAW CLAIMS?

A. The Court of Appeals Erred in Not Addressing Appellants' Fourth and Fifth Points of Error.

The Court of Appeals erred in failing to address the Appellants' Fourth and Fifth Points of Error. The Court of Appeals is required to "address every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 90(a). In order for the Court of Appeals to affirm the summary judgment of the trial court on the Garners' ERISA claims, the court must necessarily address the ERISA issues presented in Appellants' Fourth and Fifth Points of Error. It did not.

B. John Garner Pled Claims Under Federal ERISA Law Based On the Existence of An Informal Plan. These ERISA Claims Are Separate and Distinct From Any Contract Claim Under the 1980 Commitment

Appellants, in the trial court below, pled claims under federal law based upon the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA"). Appellants claimed that John Garner's former employer established an *informal* employee benefit plan and that, under federal law, the Appellee is liable for the benefits under the plan. The Appellee never moved for summary judgment on the Appellants' ERISA claims. There was summary judgment evidence sufficient to support a claim under ERISA based upon the existence of an informal ERISA plan. The trial court granted summary judgment on the Appellants' ERISA claims. This error was raised before this Court in the Appellants' Fourth and Fifth Points of Error.

Although preserved on appeal by the Appellants, the Court of Appeals did not address these issues in its opinion. There is no discussion of Garner's rights under federal law. There is not one federal statute or case cited in the court's opinion. There is no discussion with respect to the summary judgment evidence (Garner's affidavit and other documents) that raise a fact issue on each and every element of an ERISA claim based upon the existence of an informal employee benefit plan. This Court has the *duty* to entertain the Appellants' claims based upon federal law. The Court of Appeals assumes – without discussion – that *the Appellants' whole case* is a suit under an employment contract, although the benefits sued for are clearly employee benefits and the Garners'

ERISA claims are separate and distinct from their contract claims. The Garners' contract theory and ERISA theory (which does not require a formal plan) are emphatically not mutually exclusive theories of recovery.

The distinction is recognized in the Garners' Third Amended Petition which was before the trial court at the summary judgment stage:

The pleading based upon the employment contract theory stems from the 1980 Commitment:

> John H. Garner (hereinafter referred to as "Garner") entered into an *agreement* with Corpus Christi National Bank on August 4, 1980. The bank recognized *the agreement* and partially performed *the agreement*, but failed totally perform [six] all terms and conditions of *the agreement*, and breached its obligations under said *agreement*.

Tr. 435 (emphasis added).

The alternative, ERISA claims are based upon much broader "representations," not merely the 1980 Commitment:

> Alternatively, as a consequence of the Defendants' *representations*, the Plaintiffs are entitled to the benefits described in the Executives Security Plan, and, in addition, are entitled to reasonable attorney's fees, under applicable federal law. *See* Chapter 19 of Title 29 of the United States Code.

Tr. 436 (emphasis added).

CCNB need not formally "adopt" the MSP or ESP (the requirement, under this court's understanding of the

1980 Commitment, of CCNB's *contractual* liability) to be liable under federal law, but only (informally) "establish or maintain" it. The federal "establish or maintain" test (especially under the informal plan doctrine) is a much weaker test than a formal contractual "adoption." In other words, even if CCNB is not liable *ex contractu* under the 1980 Commitment, CCNB can be statutorily liable under federal ERISA law because of its representations to its employee. Under ERISA, an employee has a federal cause of action against his employer for breach of the terms of an informally established or maintained plan. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 941 (3rd Cir. 1985); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*).

The summary judgment evidence raises a material issue of fact independent of the 1980 Commitment that John Garner was the employee of CCNB and that the MSP and (later) ESP was a "plan, fund or program" *informally* "established or maintained" by CCNB for John Garner's benefit. There is consequently summary judgment evidence with respect to all the elements for establishing an informal ERISA plan under the four-prong *Donovan* test.[1] *See Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*); 29 U.S.C. §§ 1002(1), 2(A); *see also Hansen v. Continental Insurance Co.* 940 F.2d 971, 977 (5th Cir. 1991); *Landry v. Air Line Pilots Association International*, 901 F.2d 404, 415 (5th Cir. 1990). In other words, through ERISA, federal law places liability on an employer *irrespective of the employer and its holding*

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[1] Discussion of ERISA and the informal plan doctrine can be found in pages 21-36 of the Appellants' Brief.

company's contractual efforts to shift liability between themselves and/or the employee.

Summary judgment on the Garners' pled ERISA claims was therefore in error. CCNB never moved for judgment on the Garners' ERISA claims. Summary judgment on the garners' ERISA claims is also precluded by the summary judgment evidence. This Court of Appeals should reverse and render judgment in favor of the Garners or reverse and remand based on the Garners' ERISA claims.

* * *

WHEREFORE, PREMISES CONSIDERED, the Appellants respectfully request this Court to grant this Motion for Rehearing, to withdraw its former opinion, and to reverse the judgment of the trial court and render judgment for the Appellants as pled in their Brief or reverse the judgment of the trial court for trial on the merits on all claims, including claims under . . . , ERISA . . . , and to grant all such other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX C-3

Excerpts From Appellants' Second Motion For Rehearing Filed In The Thirteenth Court Of Appeals Raising ERISA Issues

NO. 13-95-105-CV

IN THE COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

JOHN H. GARNER, AND WIFE, LANELLE H. GARNER,

Appellants,

vs.

CORPUS CHRISTI NATIONAL BANK,

Appellee.

APPELLANTS' SECOND MOTION FOR REHEARING

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

COME NOW John H. Garner, and wife, Lanelle H. Garner, Appellants, and file this their Second Motion for Rehearing in response to the opinion issued by this court on April 10, 1997, and the opinion issued by this Court on May 22, 1997, denying the Appellants' first Motion for Rehearing, and request this Court consider the following points of error:

POINTS OF ERROR ON REHEARING

1. The Court of Appeals erred in failing to address the Appellants' Fourth and Fifth Points of Error. (Op. at 18)

* * *

3. The Court of Appeals erred in affirming the trial court's summary judgment with respect to the Appellants' ERISA claims and overruling the Appellants' Fourth and Fifth Points of Error because a material issue of fact is raised by the summary judgment evidence that CCNB established or maintained an ***informal*** benefit plan for the benefit of its employee, John Garner. (Op. at 18)

4. The Court of Appeals erred in overruling the Appellants' Sixth and Seventh Points of Error. (Op. at 10)

5. The Court of Appeals erred in holding that the ERISA claim encompasses the State law claim.

6. The Court of Appeals erred in holding that by finding that the employer did not breach the contractual provisions of the 1980 Commitment and the formal MCorp ESP or its predecessor, it was therefore absolved from liability.

7. The Court of Appeals erred in failing to consider the Garners' claim of an "informal" ERISA plan. The Court of Appeals' analysis with respect to the Garners' ERISA claims was improperly limited to analysis of formal plan documents or other contracts.

8. The Court of Appeals erred in not addressing the Garners' points of error on appeal and in their first motion for rehearing relating to the existence of an informal employee benefit plan established or maintained by Garner's employer.

ARGUMENT ON POINTS 1-8

I. JOHN GARNER'S FEDERAL LAW CLAIMS STILL HAVE NOT BEEN ADDRESSED

Appellants, in the trial court below, pled claims under federal law based upon the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA"). Appellants claimed that John Garner's former employer established an *INFORMAL* employee benefit plan and that, under federal law, the Appellee is liable for the benefits under the plan.

On rehearing, the Court of Appeals did not address these issues in its opinion. There is no discussion of Garner's rights under federal law under the INFORMAL plan doctrine. There is not one federal statute or case cited in the Court's opinion on the INFORMAL plan doctrine. There is no discussion with respect to the summary judgment evidence (Garner's affidavit and other documents) that raise a fact issue on each and every element of an ERISA claim based upon the existence of an INFORMAL employee benefit plan. Although the Court of Appeals addresses Garner's ERISA claim under a formal plan between him and MCorp, it is silent on the existence or non-existence, the breach or performance, of an INFORMAL plan. This is a cognizable claim under federal law which deserves a hearing and has yet to be heard.

WHEREFORE, PREMISES CONSIDERED, the Appellants respectfully request this Court to grant this Second Motion for Rehearing, to withdraw its former opinion, and to reverse the judgment of the trial court and render judgment for the Appellants as pled in their Brief or

reverse that judgment of the trial court for trial on the merits on all ERISA claims, and to grant all such other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

APPENDIX C-4

Official Notice Of Thirteenth Court Of Appeals Denying Second Motion For Rehearing

OFFICIAL NOTICE
COURT OF APPEALS
13TH JUDICIAL DISTRICT

June 19, 1997

RE: Case No. 13-95-00105-CV
Style: Garner, John and wife, Lanelle H. Garner
v. Corpus Christi National Bank

The appellee's second motion for rehearing in the above cause was this day OVERRULED by this Court.

T. C. Case #92-1938-F CATHY WILBORN, CLERK

13TH COURT OF APPEALS
10TH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

James R. Harris
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615 N. Upper Broadway, Suite 1700
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Corpus Christi, TX 78403

MAIL TO:

APPENDIX D-1

Excerpts From Application For Writ Of Error Filed In The Supreme Court Of Texas Raising ERISA Issues

CASE NO. 97-0705
IN THE SUPREME COURT OF TEXAS

****

JOHN H. GARNER, AND WIFE,
LANELLE H. GARNER,

Petitioners,

VS.

CORPUS CHRISTI NATIONAL BANK,

Respondent.

****

APPLICATION FOR WRIT OF ERROR

On Application for Writ of Error
from the Thirteenth Court of Appeals,
Corpus Christi, Nueces County, Texas

* * *

POINT OF ERROR NO. 1

THE COURT OF APPEALS ERRED IN FAILING TO ADDRESS ISSUES RAISED BY THE GARNERS' POINTS OF ERROR RELATING TO THEIR FEDERAL "INFORMAL PLAN" ERISA[1] CLAIMS THUS FAILING TO COMPLY WITH ITS MANDATORY DUTY UNDER TEX. R. APP. P. 90(a).

POINT OF ERROR NO. 2

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY JUDGMENT ON THE GARNERS' FEDERAL "INFORMAL PLAN" ERISA CLAIMS BECAUSE THE SUMMARY JUDGMENT EVIDENCE RAISES A MATERIAL ISSUE OF FACT AS TO WHETHER CCNB IS LIABLE FOR BENEFITS UNDER FEDERAL LAW BASED UPON ITS ESTABLISHING OR MAINTAINING AN *INFORMAL* ERISA PLAN.

* * *

---

[1] *See* Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. § 1001, *et seq.*, hereinafter referred to as "ERISA."

II.

THE GARNERS' ERISA CLAIMS

* * *

A. Introduction

The court of appeals erred in affirming the summary judgment against the Garner on their ERISA claims, which were based upon the "informal plan" doctrine. The court of appeals never addressed that necessary issue before embarking on an analysis of the Garners' state law claims. The court of appeals neglected to meet its mandatory duty under TEX. R. APP. P 90(a). *See Lone Star Gas Co. v. Railroad Commission of Texas*, 767 S.W.2d 709, 710-11 (Tex. 1989) (per curiam).

The existence of a fact issue on the Garners' ERISA "informal plan" claims raises a fact issue on whether the state-law claims are preempted. Thus, the court of appeals must affirmatively find that the summary judgment evidence conclusively negates at least one of the elements required under federal law under the "informal plan" doctrine. If a fact issue exists, that fact issue must be resolved by a jury either in favor of the Garners (who may then recover under federal law) or against the Garners (who then may then recover under their state-law claims).

The trial court erred in entering summary judgment against the Garners on their ERISA claims and the court of appeals erred in affirming that summary judgment without discussion or analysis. . . . Substantively, the summary judgment evidence construed in a light most favorable to the Garners raises a material issue of fact as

to whether CCNB established or maintained an "informal plan" under ERISA, precluding summary judgment.

B. The Court of Appeals Never Addressed the Garners' Claims Based Upon the Informal Plan Doctrine Under ERISA

The Court of appeals never addressed the ERISA "informal plan" issues in its opinion. This was error. *See* TEX. R. APP. P. 90(a); *Lone Star*, 767 S.W. 2d at 710-11. This court should reverse the judgment of the court of appeals and remand to the court of appeals with instructions to address the Garners' claims based upon federal law or reverse and remand to the trial court.

In their pleadings, the Garners pled claims under federal ERISA law:

> Alternatively, as a consequence of the Defendants' representations, the Plaintiffs are entitled to the benefits described in the Executive Security Plan, and, in addition, are entitled to reasonable attorney's fees, under applicable federal law. *See* Chapter 19 of Title 29 of the United States Code.

Tr. 436.

After summary judgment against them, the Garners brought points of error on appeal relating to their ERISA "informal plan" claims. *See* Appellants' Brief, Points of Error Nos. 4, 5. The Garners devoted approximately 15 pages of their Appellants' Brief (representing 30% of their brief) to an in-depth discussion of their claims under the informal plan doctrine. It cited numerous cases as authority under federal law. It repeatedly cited the summary

judgment record where material issues were raised on each element of the "informal plan" doctrine.

In its opinion, the court of appeals never addressed the issues raised by the Garners' ERISA claims under the informal plan doctrine

The court of appeals disposed of the Garners' federal law claims as follows:

> Due to our disposition of the above points [1, 2, 6, 8, 11, 12, 13, 14, and 15], we need not address the remaining points of error. Tex. R. App. P.

Op. at 18.

The court of appeals' opinion ignores the logic required by the supremacy clause and the federal preemption doctrine. The existence of a fact issue on the Garners' ERISA claims based on the existence of an "informal plan" is the first issue that must be addressed by the court of appeals. The existence of a fact issue relating to an "informal plan" raises a fact issue on federal preemption of the Garners' state-law claims. Thus, it was incumbent upon the court of appeals to address and dispose of this necessary issue before embarking on an analysis of the Garners' state law claims. In no way does the disposition of the state-law claims dispose of the Garners' federal law ERISA claims. To analyze the Garners' state-law claims before addressing the federal law claims is to put the cart before the horse.

In its opinion, the court of appeals did not cite any of the thirteen or so federal cases supporting the Garners' arguments under federal law. The court of appeals did not discuss whether the summary judgment evidence

raised a fact issue on the elements recognized under federal law that give rise to liability under the "informal plan" doctrine. It never showed where and how the Defendants had conclusively negated at least one element of an "informal plan" claim.

In their motion for rehearing, the Garners took issue with the court of appeals' failure to address their claims under the informal plan doctrine. The court of appeals overruled the Garners' motion for rehearing with an opinion.

In its opinion on rehearing, the court of appeals still failed to address the Garners' ERISA claims under the "informal plan" doctrine. The court of appeals held that CCNB was not liable to the Garners under a ***formal*** plan document between Garner and **MCorp.** On rehearing, the court of appeals never addressed whether CCNB was liable to Garner under the "informal plan" doctrine. It never cited one federal case that discusses the "informal plan" doctrine. It never undertook any analysis of the summary judgment evidence relating to the elements of recovery against an employer based upon the existence of an "informal plan" between the employer and its employee.

In its opinion disposing of the Garners' motion for rehearing, the court of appeals cited a footnote in *Forbau v. Aetna Life Insurance Co.*, 876 S.W.2d 132, 133 n. 1 (Tex. 1994), for the proposition that breach of a plan by failure to pay the required benefits is a necessary element of both state-law contract claims and ERISA claims. But *Forbau* had nothing to do with the existence or non-

existence of "informal plan." The court of appeals' reasoning is fallacious because it fails to consider the difference between the ERISA informal plan doctrine and traditional contractual principles. The legal analysis required to determine the existence of an informal plan, its terms, and its breach is substantially different that [sic] a state-law claim based upon breach of contract or an ERISA claim based upon a formal plan document between the employer and its employee. Analysis of formal plan documents between **MCorp** and Garner is not sufficient to dispose of the Garners' informal plan claims against **CCNB** because "[a]n informal plan may exist ***independent of, and in addition to,*** a formal plan as long as the informal plan meets all of the elements" required under federal law. *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (emphasis added).

C. ERISA "Informal plan" Doctrine

An understanding of the "informal plan" doctrine requires a review of the federal ERISA statutory and common law.

1. ERISA Background

In a comprehensive attempt to standardize and strengthen the rights of employees with respect to retirement benefits, the Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"). That legislation represents a conscious effort on the part of the federal government to "protect the integrity" of employee benefit plans and to secure "the expectations of their

participants and beneficiaries" in those plans. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 929 (3rd Cir. 1985). The whole intent of Congress in passing ERISA was to "make[e] sure that if a worker had been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are a requirement to obtain a vested benefit – he will actually receive it." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 1733, 64 L. Ed. 2d 354 (1980)).

2. ERISA Preempts State Law; State Court's [sic] Have Concurrent Jurisdiction

ERISA claims preempt state law claims. Under ERISA, courts (both federal and state) are charged with developing and enforcing a federal common law to the exclusion of state common law and statutes. *See* 29 U.S.C.A. § 1144(a) (West 1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S. Ct. 2890, 2897, 77 L. Ed. 2d 490 (1983). State courts have concurrent jurisdiction with federal courts to entertain civil actions brought by a participant in an ERISA plan to recover benefits or enforce his rights under the plan pursuant to 29 U.S.C. § 1132(a)(1)(B). *See* 29 U.S.C.A. § 1132(e)(1) (West 1985); *Ames v. Ames*, 776 S.W.2d 161 (Tex. 1989).

3. "Plan" Must Be "Established" or "Maintained" by "Employer" for ERISA Liability to Exist

Under ERISA, the term "employee benefit plan" means "any plan, fund, or program" which is "established or maintained by an employer" for the purpose of providing employee benefits. 29 U.S.C.A. § 1002(a), (2)(A), (3) (West Supp. Pamp. 1997). The existence of a "plan, fund, or program" is a necessary precondition to the applicability of ERISA. *See Harris v. Arkansas Book Co.*, 794 F.2d 358, 350 (8th Cir. 1986). Moreover, such a "plan, fund, or program" must be "established or maintained" before it is considered an ERISA plan subject to the ERISA provisions. *See Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 240 (5th Cir. 1990); *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). Further, the "plan, fund, or program" must be "established or maintained" by an "employer" for ERISA to apply. *Cf. Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176, 1180 (11th Cir. 1987).

4. Doctrine of "Informal Plan"

(a) *Four-prong Donovan Test*

Under federal law, an employer can "establish" or "maintain" an informal plan with very little action. Only four elements must be met to hold an employer liable under the "informal plan" doctrine. "[A] 'plan, fund, or program' under ERISA is established or maintained if from the surrounding circumstances a reasonable person

can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991) (citations omitted) (quoting *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*); 29 U.S.C. §§ 1002(1), 2(A)); *see also Hansen v. Continental Insurance Co.*, 940 F.2d 971, 977 (5th Cir. 1991) *and Landry v. Air Line Pilots Association International*, 901 F.2d 404, 415 (5th Cir. 1990) (both citing Donovan with approval for determining if ERISA plan is established).

Thus, under the *Donovan* test as adopted by the Fifth Circuit, an informal plan is established or maintained by an employer if a reasonable person can ascertain: (i) the intended benefits; (ii) the class of beneficiaries; (iii) the source of financing; and (iv) the procedures for receiving benefits under the alleged plan. The *Donovan* elements should be applied in a "flexible" manner "consistent with the legislative approach to ERISA" so as to assure a maximum degree of protection to those entitled to retirement benefits. *Williams*, 927 F.2d at 1543. Importantly, "[a]n informal plan may exist independent of, and in addition to, a formal plan as long as the informal plan meets all of the elements outlined in *Donovan*." *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994).

Clearly, the *Donovan* test for determining whether an ERISA plan was "established" or "maintained" by an employer emphasizes the reasonable expectations of the *employee* with regard to the promises and unilateral representations of his employer. The *Donovan* analysis is undertaken "from the employees' place of vantage." *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir.

1995) (quoting *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995)).

Proof that an employer "established" or "maintained" a plan can be met by any evidence of "some meaningful degree of participation by the employer in the creation or *administration* of the plan." *Hansen v. Continental Insurance Co.*, 940 F.2d at 971, 977 (5th Cir. 1991) (emphasis added). This degree of participation in the creation or administration of the plan need only be "minimal." *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 130, 131 n. 2, 113 S.Ct. 580, 854 n. 2 (1992).

Accordingly, in the context of a summary judgment proceeding, any evidence in the record, construed in the light most favorable to the Garners, that CCNB had "some meaningful degree of participation . . . in the . . . administration of the plan" precludes summary judgment in favor of the employer because it raises a fact issue as to whether CCNB "established" or "maintained" an informal ERISA plan.

(b) *Formal Plan Not Required Under Donovan; Court May Look At All Manner of Documents*

A formal document between the employer and its employee is *not* required to establish or maintain an ERISA plan "otherwise, employers could avoid federal regulation [and liability] merely by failing . . . to memorialize their employee benefit programs in a separate document so designated." *Memorial Hospital*, 904 F.2d at 241. Indeed, an "informal plan" may exist in addition to or independent from a formal plan. *Elmore*, 23 F.3d at 861.

Thus, an oral representation to pay severance pay can establish an ERISA employee benefit plan, *cf. Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985), and a letter to a single employee representing entitlement to certain retirement benefits can establish an informal ERISA plan, *see William v. Wright*, 927 F.2d 1540, 1548 (11th Cir. 1991). Evidence relevant to the issue of the presence or absence of an informal employee benefit plan would include "internal . . . documents, oral representations, . . . actual payment of benefits, . . . the reasonable understanding of employees, and the intentions of the putative sponsor." *Henglein v. Informal Plan for Plan Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 400 (3rd Cir. 1992). With regard to an employee's reasonable understanding, the "court may consider the employee's background knowledge of particular documents . . . and whether any representations of the company incorporate the terms of those documents." *Henglein*, 974 F.2d at 400. In addition, "oral representations by a knowledgeable and authorized management employee of the company may be evidence of a benefit plan, especially if a representation incorporates by reference the terms of a document or other plan." *Henglein*, 974 F.2d at 400-01.

Whether a plan is "established" or "maintained" is an issue wholly governed by federal law and, to the extent state contractual principles conflict with the *Donovan* elements, the state contractual principles should be disregarded under the preemption provisions of ERISA. *See* 29 U.S.C.A. § 1144(a) (West 1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S. Ct. 2890, 2897, 77 L.Ed.2d 490 (1983).

5. If Informal Plan "Established" or "Maintained" By CCNB, it is Liable For Benefits Thereunder Under ERISA.

Section 1132 of Title 29 of the United States Code contains the civil enforcement provisions of ERISA. That section provides:

> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C.A. § 1132(a)(1)(B) (West 1985 & Supp. Pamp. 1997).

The federal courts have recognized that an employee has a cause of action against his employer under 29 U.S.C. § 1132(a) to recover from his employer the benefits due him under an unfunded ERISA plan. *See Rockney v. Blohorn*, 877 F.2d 639-40 (8th Cir. 1989); *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 935-37 (3rd Cir. 1985).

D. Summary Judgment Raises Material Issue of Fact as to Whether CCNB "Established" or "Maintained" an "Informal Plan" Under ERISA.

The summary judgment evidence raises a material issue of fact with respect to whether CCNB "established" or "maintained" an informal ERISA plan as a result of its

1980 Commitment and the role it played with respect to the ESP benefits after it was adopted by MCorp. Over the course of Garner's employment relationship with CCNB, a reasonable person could ascertain the intended benefits, the class of beneficiaries, the source of financing, and the procedures for receiving benefits. *See Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991). In addition, it is clear from the summary judgment evidence that a fact issue is raised as to whether CCNB had "some meaningful degree of participation . . . in the . . . administration" of the ESP. *Hansen*, 940 F.2d at 977.

1. Garner Affidavit Raises Fact Issue as to Informal Plan under *Donovan* Because Garner Reasonably Ascertained Intended Benefits, Class of Beneficiaries, Source of Financing, and Procedures for Receiving Benefits

The following summary judgment of John Garner is uncontroverted:

> I was aware at the time that I was declared eligible for the Management Security Program [sic] on March 29, 1983, and when I was declared eligible for the Executive Security Program [sic] on December 28, 1984, that ***I was the intended beneficiary*** of those Plans and that ***the benefits arising out of those Plans would be pre-retirement death benefits and post-retirement income benefits.*** I also knew at the time that I was declared eligible for these Plans, that ***these Plans were unfunded benefit plans.*** I was also aware at the time that I was declared eligible for the Management Security Program [sic] and the Executive Security Program [sic] that *I*

> ***would receive benefits under these Plans through either a lump-sum payment to my estate, or periodic payments to me upon my retirement.***

Tr. 446-47 (emphasis added).

Garner's uncontroverted affidavit alone raises a material issue of fact as to each element of the *Donovan* test for establishing or maintaining an informal plan. Clearly, in light of this evidence, the trial court was in error in granting summary judgment on Garner's ERISA claim. However, there is additional summary judgment evidence to corroborate Garner's affidavit.

2. Various Documents and Deposition Testimony Corroborate Garner's Uncontroverted Affidavit; Thus Further Raising Fact Issue as to Informal Plan under *Donovan*

The summary judgment evidence, construed in a light most favorable to the Garners, raises additional issues of fact as to whether a reasonable employee, given the background circumstances and the parties' knowledge of the kind of benefits associated with the "Management Security Plan" referred to in the Commitment, could ascertain the intended benefits to be retirement and death benefits. *See Henglein*, 974 F.2d at 400 (documents to be considered in determining employee's reasonable expectations).

The "Management Security Plan," promised in the Commitment, is found in the paragraph of the Commitment dealing quite clearly with other retirement benefits that were promised Garner. This would have put any

reasonable employee under the impression that CCNB was promising retirement benefits. Further, the Commitment's reference to the "Management Security Plan" is an express reference to, and an implicit incorporation of, a particular set of documents bearing the name "Management Security Plan," which clarify the terms and benefits promised by CCNB. This court "may consider the employee's background knowledge of particular documents . . . and whether any representations of the company incorporate the terms of those documents" in determining an employee's reasonable understanding that his employer intended to establish or maintain an ERISA plan. *Henglein*, 974 F.2d at 400. Moreover, it is clear from the terms of the Commitment and the terms of the MSP and ESP that the intended beneficiary was John Garner himself and the benefits were retirement benefits.

Garner could reasonably ascertain that the source of financing for the promised benefits would come from the general assets of his employer, CCNB, and MCorp (or Mercantile Texas), the administrator of the plan, since the plan described by the Commitment was an unfunded benefit plan which was to be paid out of current income. It was further anticipated that CCNB was to "fund" MCorp's payments for the benefits made to Garner under the MSP and ESP. Tr. 186, 187.

Garner relied on the representations of CCNB that he would receive certain benefits. Tr. 447; Tr. 415. An employee's reliance on the employer's promises of benefits is evidence of an informal plan. *Belanger v. Wyman-Gordon*, 71 F.3d at 456.

The Commitment interpreted in light of (i) the actual MSP and ESP documents, (ii) correspondence between Garner and MCorp, (iii) correspondence between MCorp and CCNB, and (iv) documents in Garner's personnel file at CCNB all indicate that Garner's employee benefits would come from general assets and that no independent fund would be established from which the benefits would be paid. No more than this is required to met this prong of the *Donovan* test. The mere fact that "the payment of benefits [comes] out of an employer's general assets does not affect the threshold question of ERISA coverage." *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991) *and authorities therein cited.*

Lastly, Garner could also ascertain the procedures for receiving benefits under CCNB's informal plan. The procedures for receiving benefits are fully described in the MSP documents and in the ESP documents. In addition, the procedures for receiving benefits were more fully developed during the relationship between the parties. Gary Gulbrandsen, the personnel director of CCNB, knew that payment of benefits was to occur by monthly checks. Tr. 313. Under the *Donovan* analysis, a full description of the procedures for receiving benefits is not necessary; the *Donovan* requirement is met even if the procedures are "simple," so long as they are "sufficiently ascertainable." *Williams*, 927 F.2d at 1544. In this case, the summary judgment evidence raises an issue of fact as to whether the procedures for the receipt of benefits were sufficiently established.

3. Other Summary Judgment Evidence Raises Material Issue of Fact as to Whether CCNB Had Some Meaningful Degree of Participation in Creation or Administration of Plan Precluding Summary Judgment on the Garners' ERISA Claim

The summary judgment evidence additionally raises a material issue of fact that CCNB had "some meaningful degree of participation . . . in the . . . administration" of the MSP and ESP. *Hansen*, 940 F.2d at 977. Internal documents of CCNB and the deposition testimony of its officers amply indicate that CCNB had an intermediate role in both *administering* the benefits due Garner under the ESP and in *funding* the benefits paid by MCorp until 1986, the administrator of the ESP.

The summary judgment evidence shows, for example, that CCNB intended to provide benefits to Garner. The Commitment in light of the circumstance evidences CCNB's intent to provide both salary incentives (e.g., salary, consultant fees) and other employment and post-employment benefits (e.g., insurance policy, incentive bonus, ESOP, ICESOP, Career Executive Stock Plan and "other benefits") to Garner in the hopes of enticing him to remain in its employment and forego the opportunity Garner had been offered by Valero. Tr. 133; 325.

"[E]vidence that an employer committed to provide long-term or periodic benefits to its employees will often be telling" of the existence of an informal plan. *Belanger v. Wyman Gordon*, 71 F.3d at 455. That CCNB intended the ESP to be part of its benefits to its employees can be further inferred from its public disclosures pertaining to the ESP and from its internal treatment of the ESP. In

CCNB's Offering Circular dated September 27, 1990, CCNB admitted that "[m]any of the employee benefit plans covering the Bank's employees are administered and/or financed by MCorp." Tr. 239. The ESP was handled no differently that CCNB's other employee benefit plans which were administered by MCorp. For example, CCNB's pension plan was administered by MCorp and called the "MCorp Pension Plan," although it was the pension plan CCNB offered to its employees. Tr. 244. Indeed, the Offering Circular included a discussion of the "MCorp ESP" plan as part of its discussion of *the Bank's* employees' pension programs. Id. Gary Gulbrandsen, the principal personnel officer of CCNB, admitted that MCorp administered CCNB's plans. Tr. 316.

The internal files of CCNB likewise indicate that CCNB saw the ESP as part of the benefits it offered Garner. The personnel department of CCNB kept a copy of Garner's ESP in its personnel files, indicative that the ESP Program constituted an employee benefit arising out of Garner's employment with CCNB. Tr. 268; Tr. 317. The personnel files of CCNB listed the obligations of the "ESP" among the various other employee benefit obligations of CCNB with regard to Garner. Tr. 314-15; 317; Tr. 272-73; 247. Furthermore, the personnel department of CCNB handled various administrative matters relating to the ESP, such as how payments under the ESP would be made. Tr. 317-19. Moreover, CCNB was expected to make contributions toward the funding of the ESP plans covering its employees. Tr. 186, 187. The benefits under the ESP were linked to Garner's salary at CCNB and Garner's tenure at CCNB. Tr. 180; 411; 247.

4. Fact Issue Raised as to Whether CCNB Judicially Admitted That it Had Established an ERISA Plan for Garner's benefit

Finally, in its attempts to remove this case from state court, CCNB judicially admitted, in various pleadings and papers filed with the federal district court, that it established or maintained an ERISA plan. For example, CCNB took the position in federal court that "the contract in question is a qualifying contract subject to ERISA provisions." CCNB also took the position that the ESP was "established by Corpus Christi National Bank, the employer of John Garner, for the purpose of providing [benefits] for its participants." Tr. 544, 606.

5. Summary: Material Fact Issues on Existence of "Informal ERISA Plan" Preclude Summary Judgment

The summary judgment evidence raises a material issue of fact independent of the 1980 Commitment that John Garner was the employee of CCNB and that CCNB ***informally*** "established or maintained" a "plan, fund, or program" for John Garner's benefit. There is consequently summary judgment evidence with respect to all the elements for establishing an informal ERISA plan under the four-prong *Donovan* test.

* * *

F. Conclusion

In conclusion, the trial court erred in granting CCNB a summary judgment on Garner's ERISA claims because

CCNB never moved for judgment on Garner's ERISA claims. Moreover, the summary judgment evidence raises a material issue of fact as to whether CCNB established or maintained an informal ERISA plan as a result of its 1980 Commitment, its relationship to MCorp, and its role relating to the administration of the benefits under the ESP. Additionally, CCNB's judicial admission that it established or maintained an ERISA plan raises an issue of fact precluding summary judgment. The court of appeals erred in affirming the summary judgment of the trial court and in failing to address the Garners' ERISA claims under the informal plan doctrine. This Court should reverse the judgment of the court of appeals and remand this case to the court of appeals with instructions to address the Garners' informal plan claims or, alternatively, reverse and remand this case to the trial court for a trial on the merits on the Garners' claims based upon federal law.

* * *

CONCLUSION & PRAYER

The trial court improperly denied the Garners a trial on the merits on their ERISA . . . claims.

* * *

WHEREFORE, PREMISES CONSIDERED, Petitioners John H. Garner and wife, Lanelle H. Garner, respectfully request this Court to grant them their application for writ of error, to reverse the judgment of the court of appeals, and render judgment in their favor, remand to the court of appeals with instructions to address the informal plan

ERISA claims and the Garners' claims under the "mother hubbard" clause of the employment contract, or remand the ERISA . . . claims for a trial on the merits and/or determination of damages, and to grant all other relief, at law or in equity, to which the Petitioners may be justly entitled.

Respectfully submitted,

HARRIS & GREENWELL
P.O. Drawer 1901
Corpus Christi, Texas 78403
(512) 883-1946
FAX (512) 882-2900

By: /s/ Andrew M. Greenwell
Andrew M. Greenwell
State Bar No. 00784170
James R. Harris
State Bar No. 09066000

Attorneys for Petitioners,
John H. Garner, and wife,
Lanelle H. Garner

APPENDIX D-2

Official Notice Of Order Denying Petitioners' Application For Writ Of Error In Texas Supreme Court

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 08, 1998

Mr. Thomas F. Nye
Brin & Brin
1202 Third Street
Corpus Christi, TX 78404

Ms. Linda C. Breck
Brin & Brin
1202 Third Street
Corpus Christi, TX 78404

Mr. Ronald B. Brin
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1202 Third Street
Corpus Christi, TX 78404

Mr. Andrew M. Greenwell
Harris & Greenwell
P. O. Drawer 1901
Corpus Christi, TX 78403

Mr. James R. Harris
Harris & Greenwell
P. O. Drawer 1901
Corpus Christi, TX 78403

RE: Case Number 97-0705
Court of Appeals Number: 13-95-00105-CV
Trial Court Number: 92-1938-F

Style: CORPUS CHRISTI NATIONAL BANK
v.
JOHN H. GARNER and wife,
LANELLE H. GARNER

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

APPENDIX D-3

Excerpts From Motion For Rehearing Of Denial Of Application For Writ Of Error Filed In The Supreme Court Of Texas Raising ERISA Issues

CASE NO. 97-0705

IN THE SUPREME COURT OF TEXAS

****

**JOHN H. GARNER, AND WIFE,
LANELLE H. GARNER,**

Petitioners,

VS.

CORPUS CHRISTI NATIONAL BANK,

Respondent.

****

MOTION FOR REHEARING ON DENIAL OF PETITIONERS' APPLICATION FOR WRIT OF ERROR AND/OR MOTION FOR SEVERANCE

(Filed May 18, 1998)

TO THE HONORABLE SUPREME COURT OF TEXAS:

COME NOW JOHN H. GARNER, and wife LANELLE H. GARNER, Petitioners, and file this their Motion for Rehearing on Denial of Petitioners' Application for Writ of Error and/or Motion for Severance and in support thereof respectfully show this Court as follows:

I.

On May 8, 1998, this Court denied the Petitioners' application for writ of error with the notation "Writ Denied." Because of the important state-law and federal issues raised in the Petitioners' Application for Writ of Error, the Petitioners request this Court to reconsider its judgment denying Petitioners their application for writ of error.

II.
ERISA-Related Points of Error

Point of Error No. 1

The court of appeals erred in failing to address issues raised by the Garners' points of error relating to their federal "informal plan" ERISA claims.

Point of Error No. 2

The court of appeals erred in refusing to recognize and enforce the Garners' federal common law and statutory rights based upon their allegations of the existence of an "informal plan" under ERISA.

Point of Error No. 3

The court of appeals erred in affirming the trial court's summary judgment on the Garners' federal "informal plan" ERISA claims because the summary judgment evidence raises a material issue of fact as to each element under federal law to hold CCNB liable under the "informal plan" doctrine.

Point of Error No. 4

The court of appeals erred in affirming the trial court's summary judgment on the Garners' ERISA claims, whether based upon the "informal plan" doctrine or the existence of a formal plan document.

III.
Discussion of ERISA-based Points

The court of appeals erred in ignoring the Petitioners' points of error relating to whether the Petitioners raised a fact issue on each element of a claim under the ERISA-based "informal plan" doctrine. Because the summary judgment evidence unquestionably raises an issue of material fact on each material element under the federal "informal plan" doctrine, the court of appeals' action, and this Court's decision not to grant the Petitioners' application for writ of error, effectively divests the Petitioners of their federal rights under ERISA without a motion by the Respondent, without a hearing, and without analysis or discussion. *See, e.g., Williams v. Wright,* 927 F.2d 1540, 1543 (11th Cir. 1991); *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982) (*en banc*); *Hansen v. Continental Insurance Co.,* 940 F.2d 971, 977 (5th Cir. 1991); *Landry v. Air Line Pilots Association International,* 901 F.2d 404, 415 (5th Cir. 1990); 29 U.S.C. §§ 1002(1), 2(A), 1132(a). The court of appeals' ruling on the Petitioners' informal ERISA plan claims is the epitome of arbitrariness and deprives the Garners' of the right to have a state court recognize and enforce substantive federal law and remedies based upon that substantive federal law.

* * *

WHEREFORE, PREMISES CONSIDERED, Petitioners John H. Garner, and Lanelle H. Garner, respectfully request this Court to grant their motion for rehearing, grant their application for writ of error, and, upon oral argument, reverse the entire case and remand for

retrial, . . . and to grant all such other relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

HARRIS & GREENWELL
P.O. Drawer 1901
Corpus Christi, Texas 78403
(512) 883-1946
FAX (512) 882-2900

By: /s/ Andrew M. Greenwell
Andrew M. Greenwell
State Bar No. 00784170
James R. Harris
State Bar No. 09066000

Attorneys for John H. Garner and Lanelle H. Garner, his Wife, Petitioners

APPENDIX D-4

Official Notice Of Order Denying Petitioners' Motion For Rehearing Of Denial Of Application For Writ Of Error

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

July 03, 1998

Mr. Thomas F. Nye
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Corpus Christi, TX 78403

Mr. James R. Harris
Harris & Greenwell
P. O. Drawer 1901
Corpus Christi, TX 78403

RE: Case Number 97-0705
Court of Appeals Number: 13-95-00105-CV
Trial Court Number: 92-1938-F

Style: CORPUS CHRISTI NATIONAL BANK
v.
JOHN H. GARNER and wife,
LANELLE H. GARNER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp
Michael H. Kopp, Deputy

APPENDIX E-1

1980 Commitment

Corpus Christi National Bank – Policy Commitment

Commitment made to John Garner as of August 4, 1980:

J.G. to continue in bank's employ, subject to health and ability to perform, at following base salary:

Commencing Aug. 1, 1980-$135,000 per year, paid 1/12 monthly

Commencing Jan. 1, 1981 – $148,500 per year, paid 1/12 monthly

Commencing Jan. 1, 1982 – through 1985, minimum increase of 10% per year, resulting in minimums for calendar years, thus: 1982 – $163,350; 1983 – $179,685; 1984 – $197,854; 1985 – $217,639.

Commencing Jan. 1, 1986, and continuing for a total of five years (i.e., calendar years 1986 through 1990) – $100,000 per year for part time service as approved by Board of Directors, not to exceed half time. This does not mean that Board of Directors may not continue to employee J.G. if agreed by both at agreed salary.

The foregoing base salary commitment shall be terminated by death or disability.

If J.G. is insurable at normal rates so the Bank's payment of the five $100,000 payments for 1986-1990 may be insured by a policy on J.G.'s life, Bank will agree to pay to J.G.'s estate or nominee under his will such number of such $100,000 payments as may not have been paid prior to his death.

J.G. is to be entitled to incentive bonus, ESOP plan, ICESOP plan, Career Executive Stock Plan, and Management Security Plan (if adopted) and other benefits of executive employees – all based on his base salary or otherwise as applicable.

M. Harvey Weil
Charles Pratt
Fred W. Heldenfels, Jr.
Mark H. Hulings
Richard King, III
Dr. McIver Furman